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CONSTRUCTIVE MALICE REVIVED

A FEW weeks ago *Punch* remarked that moderation is the reformer's worst enemy. When pressure for reform reaches a sufficient pitch, the moderate will himself bring in the reform measure; but he will leave it subject to comfortable exceptions which will enable many of the old abuses to continue. Indeed, by removing the most glaring scandals, he ensures that a multitude of petty injustices are perpetuated, because no one of them will appeal sufficiently to the sympathetic imagination to give the reformers a chance to start again. And it may be found that the exceptions left in the measure are so wide that even great abuses can, after a time, be reintroduced, when the movement for reform has disbanded itself.

Leaving *Punch* and coming to the real world—which means, without imputing diabolical intentions either to the Government or to the judges—this is how things have worked out in respect of section 1 of the Homicide Act, 1957.

One object of the reformers of our penal system has been to abolish the doctrine of constructive malice in murder. Eventually, that is to say after the doctrine had been criticised for at least a century, the Government thought that perhaps the time had come to abolish it. But it was the Government that worded the measure intended to effect this; and the measure did not make a clean job, because it left one type of constructive malice operating. Lately the judges have been demonstrating that this one exception does all the work of the old law which we thought was abolished.

At common law there was a form of murderous malice the precise scope of which may be debated, but which certainly went to the following extent. Where the accused intended to cause grievous bodily harm, and death followed in consequence, he could be held guilty of murder. Now, in *D.P.P.* v. *Smith*,[1] the House of Lords has set its seal to an extensive interpretation of this rule which, if logically pressed, must inevitably reintroduce the forms of constructive malice purported to be abolished by section 1 of the Homicide

[1] [1960] 3 W.L.R. 546; [1960] 3 All E.R. 161.

Act, and indeed give them in some respects a wider extension than they possessed under the old law.

The facts were that the accused, Smith, was driving a car, in the back of which were some sacks of stolen goods. A policeman, noticing the sacks, told him to draw in to the kerb, but instead Smith accelerated. The constable clung to the side of the car; Smith zig-zagged to shake him off, and eventually succeeded. Unfortunately, another car was approaching from the opposite direction, and this ran over the fallen constable and killed him. Had a car not come at that moment, the constable would not have been killed; so his death was, from this point of view, an accident. Of course, Smith intended to shake the constable off, but he did not intend to kill him. The constable's fall into the road was intended, but his death was accidental. Nevertheless, Smith was convicted of murder by the jury. The conviction was reduced to manslaughter by the Court of Criminal Appeal, but the Crown took a further appeal to the House of Lords, and in the Lords the conviction for murder was restored.

The rule laid down in the Lords may be shortly stated. Putting aside the ordinary case of an intention to kill, and ignoring also the possible defences in murder like provocation and diminished responsibility, a person is guilty of murder if three conditions are satisfied. First, he must intend to do something unlawful to someone, in the sense of "aiming at" someone. Secondly, the unlawful act so voluntarily done must be of such a kind that grievous bodily harm (or death) is the natural and probable result. Thirdly, the act must cause death. If these three conditions are fulfilled—of which only the first relates to the state of the accused's mind—the accused cannot defend himself by saying that he did not intend death or grievous bodily harm, or even that he did not foresee either. Moreover, the prosecution need not show that an ordinary man would have foreseen the likelihood of death, but only that he would have foreseen the likelihood of really serious harm—which need not be sufficiently serious to involve the foreseeable likelihood of death.

There are two ways in which the decision settles for a stringent interpretation of malice aforethought. The first is in relation to the phrase "grievous bodily harm," and the second in relation to the mental element.

The Interpretation of "Grievous Bodily Harm"

In one respect, and only in one respect, the House of Lords has adopted a construction of the law favourable to the accused. It was formerly thought that interference with the health or comfort of the victim was a grievous bodily harm, but this view is expressly disapproved, not only for murder but for the offence under section 18 of the Offences against the Person Act, 1861. Viscount Kilmuir, who in effect delivered the judgment of the House, said that

" grievous bodily harm " meant " really serious harm." However, he went on to say that this really serious harm need not be likely to kill.

It is in relation to this last ruling that one feels inclined to quarrel. Why is " really serious harm " referred to in connection with the modern law of murder unless it means " harm likely to result in death "? Surely, the reason for retaining this form of constructive malice is that a person who inflicts very dangerous harm is not allowed to say that he did not intend to kill, because that is too easy a lie for the real murderer. But this reason, whatever may be thought of its validity, does not apply if the harm is unlikely to be fatal. In that case, the prosecution should be forced back upon proof of a real intention to kill.

It may be added that the wide interpretation of the law on this point expressed in the House of Lords was unnecessary for the decision of the case. The intention of the accused in the case before their Lordships was to throw the deceased constable off the car on to the road on which there was much traffic.[2] This exposed him to obvious danger to life. We may continue to hope, faintly, that the law on this subject has not passed beyond recall.

The Attenuation of the Mental Element in Murder

According to the decision of the House of Lords, there is no longer any need in murder to prove an intent to kill or to do grievous bodily harm. The only intent necessary is an intent to do something unlawful to someone.

There seems to be no escaping the conclusion that this rule virtually reintroduces into the law the greater part if not the whole of the felony-murder rule which was intended to be abolished by the Homicide Act, s. 1. In practice, the felony-murder rule applied before 1957 to the robber and violent rapist who accidentally killed. Now, both the robber and the rapist intend to do something unlawful to someone, and in practically every case of violent rape and robbery resulting in death an ordinary man would surely realise the danger of inflicting at least grievous bodily harm (the second of the three conditions for murder laid down by the House). Consequently, whenever the victim dies, there must automatically be a case of murder.

Before the Homicide Act, some judges had cut down the felony-murder rule by holding that the rule operated only when the felony was " violent "[3]; others had confined it still further by requiring that the felony must be likely to cause death.[4] Limited in this way, the rule was narrower than the one now stated by the House of

[2] Reference to the heavy traffic was made by Lord Tucker in the course of argument: see *The Times*, June 30, 1960.

[3] *D.P.P.* v. *Beard* [1920] A.C. 479 at pp. 504, 507.

[4] *Horsey* (1862) 3 F. & F. 287; *Whitmarsh* (1898) 62 J.P. 711; *Lumley* (1911) 76 J.P. 208; 22 Cox 635.

Lords. For *Smith* tells us that if the accused was doing any unlawful act—not merely a violent and dangerous felony—he can be convicted of murder if his act were dangerous. Thus, in addition to bringing back the felony-murder rule, the House of Lords has given birth to a misdemeanour-murder rule and a summary-offence-murder rule. The House showed no consciousness of the fact that it was nullifying the Homicide Act in this way, but that seems to be the practical effect.

Take the case of rape. Where death is caused in a violent rape, it usually occurs because the accused has tried to still his victim by half-throttling her or stunning her, and has gone too far. It is obvious that in these circumstances the ordinary man would foresee the likelihood of grievous harm, and indeed of death, from what is done. Consequently, if an objective test is applied, all such cases of death resulting from rape must be murder.[5]

Again, suppose that the facts of *Jarmain* [6] recurred today. It will be remembered that the accused tried to frighten a cashier with a loaded gun in order to commit robbery; the gun went off—as he said, by inadvertence—and the cashier was killed. It was held that this was murder under the felony-murder rule. It would still be murder under the rule in *Smith*. For Jarmain clearly intended to do something unlawful to the cashier, namely to commit a robbery from him; and the act of a robber in pointing a loaded gun at a man is likely to cause grievous harm, even if he does not intend to shoot, because many things may happen to cause the gun to go off; and the cashier was killed. So the three conditions specified in *Smith's* case were present.

Now Parliament must have meant something when it abolished the felony-murder rule. It could not have been intended that the practical effect of that rule should be reintroduced under the doctrine of intending grievous bodily harm. This argument suggests that the doctrine of intending grievous bodily harm should not be extended to include constructive intent.

Moreover, whereas the rule in *Jarmain* was limited to deaths

[5] It is, of course, true that death may occur in rape because the victim has a weak heart, or because of the operation of a physiological mechanism which has only recently become known. The victim of rape when pinned by the neck sometimes dies suddenly in consequence of vagal inhibitory reflex arising from the pressure of fingers on the carotid sheaths—even where that pressure is light and could in no sense reflect any desire to cause grievous bodily harm. See Keith Simpson (ed.), *Modern Trends in Forensic Medicine* (London, 1953) p. 73. *Ibid.* at pp. 71–72 reports a case where a soldier, dancing with a healthy girl of 22 years, edged her to a corner and placed his hands in a grip across her throat, "tweaking it playfully," a mere momentary tightening seen by others. She immediately collapsed to the floor, lay still, and was plainly dead. Autopsy revealed no mark of any kind, nor any pathological changes. Where death results from an act of this type in the course of rape, it would not be murder under the present law, and would quite possibly not have been treated as murder in the days of the felony-murder rule.

[6] [1946] K.B. 74 (C.C.A.).

accidentally caused in committing felony, the rule in *Smith* is not confined to felonies, but extends to all unlawful acts, which must mean to all crimes.[7] Suppose that in *Jarmain* the intent had not been to rob but only to commit a stupid practical joke. I do not suppose that anyone at the time of *Jarmain* would then have thought the crime to be murder. But one who threatens another with a revolver commits an assault; he therefore intends to do something unlawful to him (*viz.*, to frighten him by way of criminal assault); and the conclusion follows that the accidental killing makes him a murderer.

As another example, suppose that a man mixes a poison in another's drink intending only to make him sick or to lose consciousness or self-control, but a reasonable man would have realised that the poison would be likely to kill. This is now murder if death results. Yet most people would say that the moral guilt of such an act is less than murder. It would not have been murder even under the old felony-murder rule, since that applied in practice only to felonies of force or violence, and poisoning is not a felony of violence, though it is of course a very serious crime.

It is worth recalling at this point the precise terms of section 1 of the Act of 1957. This declares that where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence; and there is a similar provision for killing in the course of resisting arrest. One knows from the debates in Parliament (doubtfully reinforced from the technical point of view by the draftsman's saving of "implied malice") that the Act was not intended to affect the rule that a person who sets out to commit grievous bodily harm is guilty of murder if death results. But, apart from that, the section seems clearly to mean that the commission of some crime other than murder is irrelevant to a charge of murder, and cannot form a step in the reasoning leading to conviction. Under the rule stated by Viscount Kilmuir, the unlawful act doctrine is reintroduced into the law of murder. In the example of poisoning, the conclusion of murder under Viscount Kilmuir's rule follows from premises one of which is that the accused intended to commit the unlawful act of administering poison. Yet the section directs the court on a charge of murder to ignore the fact that the killing happened in the course or furtherance of some other offence.

Again, what of criminal acts done with the consent of the victim? On a literal reading of the Lord Chancellor's speech, it

[7] One might even have to contemplate a tort-murder rule, but for the fact that Viscount Kilmuir happened to quote a passage from a judgment of Palles C.B. which leads one to suppose that he must have been thinking of criminal intents exclusively.

seems that the unskilled abortionist who causes the death of a woman as a result of operating upon her is now guilty of murder. For many years, this crime has not been treated as murder. The illegal abortionist who unluckily kills his patient is convicted of manslaughter, not of murder. Even in the days when it was murder to kill as the result of a felony, this doctrine came to be restricted in practice to cases where the felony involved violence to an unwilling victim; consequently, although abortion was and is a felony, no abortionist has (I believe) been convicted of murder during the present century. Yet it seems that the abortionist may now be guilty of murder if he kills the woman through lack of skill; for he certainly intends to do something unlawful to her, and unskilled abortion is likely to cause serious harm or death. A way out would be to say that Viscount Kilmuir was not referring to acts done with the consent of the victim, since that question was not present to his mind.

For the same reason as the felony-murder rule is revived, the conclusion seems inescapable that the House of Lords has now revived another form of constructive malice, also purported to be abolished by section 1 of the Homicide Act, namely the intent to resist arrest or to escape from custody by the use of violence. One who uses violence against a custodian or would-be arrester in order to escape does something unlawful to the person in question; and the use of violence would, at least in many cases, cause the ordinary person to foresee the likelihood of grievous bodily harm—bearing in mind that the custodian or arrester is likely to brave the violence in order to frustrate the escape. *Smith* was itself a case of the use of violence to resist arrest; and Smith was convicted of murder without proof of either an intent to kill or an intent to commit grievous harm. The demonstration that the old forms of constructive malice are alive again seems complete.

Of course, to say that certain consequences logically follow from a decision is not to say that they will follow. In some of the instances I have given, it may well be that a trial judge would "play down" the decision in *Smith* in his direction to the jury, and that the jury would in any case refuse to convict of murder. But it is certainly no merit of an appellate pronouncement that it has to be restrictively distinguished or ignored in order to reach a result according with the general sense of justice. Moreover, a restrictive attitude on the part of judges and independence on the part of juries cannot by any means be counted on. Smith was himself convicted of murder by the jury; and there were many convictions by juries in the days of the felony-murder rule (and in the days of capital punishment for all murders) where the verdict was clearly the outcome of pressure by the judge in his direction on the law.

The climate of opinion on the objective theory in murder

The effect of the view taken in the House of Lords is to give the fullest approval to the previous decisions of the Court of Criminal Appeal in *Ward* [8] and *Vickers*.[9]

It is not the custom of English judges to refer to discussions in legal journals, of whatever eminence the authors may be, and so it is, perhaps, not surprising that no word appears of the great weight of opinion that has been accumulating against these two decisions. In Oxford, Dr. Goodhart referred to *Ward* as " that unfortunate case," and gave reasons why he thought so.[10] From Cambridge, Mr. Turner's remarks to the same general effect on *Vickers* were published in the pages of the *Criminal Law Review*.[11] That the opinions of the younger experts in criminal law provided by the University of London were to the same effect can be seen from contributions to this *Review* by Mr. Denny and Mr. Hall Williams,[12] and Mr. Prevezer's detailed indictment of *Vickers* in the pages of the *Criminal Law Review*.[13] Similar remarks are expressed in Professor J. Ll. J. Edwards's study published in the *University of Malaya Law Review*.[14] If the reader is impatient with this list of academic opinions, he may be more ready to attach weight to the view of another well-known legal writer, not unversed in legal practice, Sir Patrick Devlin, who criticised the rule in both cases (by anticipation), again in the pages of the *Criminal Law Review*.[15]

The only support for *Ward* and *Vickers* expressed in legal writings came from two authors who were under the impression that they decided something less than the House of Lords has now authoritatively determined. Group-Captain J. T. Lowe took the view that *Ward* was rightly decided, but he thought the rule referred only to cases where death or grievous bodily harm was the *inevitable* consequence of the accused's act.[16] Viscount Kilmuir insists in his speech that this limitation is incorrect; there is no warrant, he says, for distinguishing between harm " certain " to result and harm " likely " to result. The other writer, an anonymous contributor to the *Criminal Law Review*, supported *Vickers* on the assumption that it meant that in murder the accused must be shown to have intended to kill or do great bodily harm.[17] But that assumption, too, is now shown to be wrong. Thus the House of Lords has marched ahead of its few literary allies.

Of all these opinions there is no memorial in the judgment. Viscount Kilmuir did, indeed, grace his page with one reference to

8 [1956] 1 Q.B. 351.
9 [1957] 2 Q.B. 664.
10 72 L.Q.R. 166.
11 [1958] Crim.L.R. 15.
12 19 M.L.R. 414; 20 M.L.R. 635.
13 [1956] Crim.L.R. 375.
14 1 Univ. of Malaya L.Rev. 17.
15 [1954] Crim.L.R. 668.
16 [1958] Crim.L.R. 298, 374, 453.
17 [1958] Crim.L.R. 714.

an opinion which was not of a purely judicial character, but it came from another hemisphere and another century. This was O. W. Holmes's *The Common Law* (referred to as "that persuasive authority by Holmes J."), published in Boston in 1881. The passage quoted laid down the sweeping and wholly unacceptable proposition that, in criminal law generally, the question of foresight is to be resolved exclusively by reference to what a man of reasonable foresight would have foreseen. It seems a pity, if an extrajudicial source is to be quoted, that care should not be taken to ascertain the movement of opinion since it appeared. Greatly as Holmes J. is venerated in the United States, it is fair to say that his theory of objective responsibility in crime is now regarded, over there, as an unfortunate aberration. In the United States a strong effort is being made by legal commentators, as it is in England, to make the criminal law more "subjective" in its approach. The arguments against Holmes's position are expressed at length in, to take one example, Professor Jerome Hall's *General Principles of Criminal Law*, whose work is frequently referred to in English as well as American legal literature.

While on this topic, it is worth referring to the striking difference between the Supreme Court of the United States and our House of Lords (and other courts) in the respect paid to the opinions of legal writers, whether academic or otherwise. Opinions of the Supreme Court of the United States make frequently explicit reference to the contributions of the Professors of Law, of whom in the United States there is an extremely large number, and treat their views with respect, while not, of course, always adopting them. And this practice is followed not merely with classical dissertations eighty years old, but with live books and articles within a week of their appearance—even with articles in the legal periodicals of Britain and the rest of the Commonwealth. The practice is a reflection of the fact that the Supreme Court Bench includes lively and knowledgeable men, who take a pride in keeping abreast of the thought of their day and who are made even more knowledgeable by their clerks, young men with star degrees from leading Law Schools whose job it is to see that they miss nothing. It is perhaps the weight of academic opinion that has caused, or helped, the Supreme Court to reaffirm the subjective basis of criminal law in a few striking judgments of recent years, notably *Morissette* v. *United States*.[18]

The judicial authorities

Following upon the citation of Holmes, Viscount Kilmuir chose his next authority as follows. "In *R.* v. *Faulkner* [19] the Court of Crown Cases Reserved for Ireland upheld a conviction for arson of a sailor who, with intent to steal, tapped a cask of rum. He was

[18] (1952) 342 U.S. 246, 72 S.Ct. 240.
[19] (1877) 13 Cox 550, 561–562.

holding a lighted match and the rum caught fire and the vessel was destroyed. Palles C.B. said: 'In my judgment the law imputes to a person who wilfully commits a criminal act an intention to do everything which is the probable consequence of the act constituting the *corpus delicti* which actually ensues. In my opinion this inference arises irrespective of the particular consequence which ensued being or not being foreseen by the criminal, and whether his conduct is reckless or the reverse. This much I have deemed it right to say to prevent misconception as to the grounds upon which my opinion is based.' "

Thus the *Weekly Law Reports*—and the *All England Reports*. The passage is so contrary to all that one knows of the crime of arson that one rubs one's eyes and goes for the copy of *Cox* containing the report of *Faulkner*. There, one finds that the conviction was not upheld but quashed. And Palles C.B.'s remark was an *obiter dictum* that had no influence upon the outcome of the case, any more than it has influenced the later course of decision. If the House of Lords regards an *obiter dictum* of an Irish judge in a case of arson in 1877 as relevant to the law of murder, it seems strange that their Lordships did not pursue the law of arson into modern English authorities. They would have found the case of *Cunningham*,[20] where the Court of Criminal Appeal held that, in crimes of statutory malice like arson, such malice "postulates foresight of consequence."

Perhaps we are now to be told that the word "foresight" as used in all earlier judgments does not refer to the accused's foresight at all; it refers to the fictitious foresight that is deemed to be possessed by the ordinary man whom one pretends stands in the shoes of the accused. It is to be hoped that such language of fiction will not descend upon the criminal law, if only because the layman will rightly characterise it as double-talk and double-think. If judges do not mean foresight to be an element in a crime, that is to say the foresight of the accused, let them say so—not require foresight and then deem it to be fictitiously present.

Lord Kilmuir's next authority for the objective theory of murder is just as surprising as his citation of *Faulkner*. He said: "In *R.* v. *Lumley* [21] Avory J. directed the jury in these terms: 'When he did the act, did he contemplate, or must he as a reasonable man have contemplated, that death was likely to result, or must he as a reasonable man have contemplated that grievous bodily harm was likely to result? If, in your opinion, he must as a reasonable man have contemplated either of those consequences, then your duty is to find him guilty of murder.' "

This quotation is not accompanied by a statement of the facts of *Lumley*. Reference to the report shows that the facts were that the death occurred as a result of the felony of abortion, and Avory

[20] [1957] 2 Q.B. 396 (C.C.A.).
[21] (1911) 22 Cox 635, 636.

J. was trying to give a merciful direction which would save the accused from the consequence of the felony-murder rule as it was then interpreted. It is in that context that the remark is to be understood—as Mr. Prevezer pointed out in the pages of the *Criminal Law Review*,[22] and as Mr. Denny pointed out in this *Review*.[23] Avory J. was in effect instructing the jury that they need not apply the felony-murder rule unless the abortion were performed in a way that was likely to cause grievous bodily harm. Since the decision turned on the felony-murder rule, and since that rule has been abolished, the decision has no relevance to the present law.

The same remark applies to Viscount Kilmuir's later reference to *Beard*,[24] which he summarised by saying that " your Lordships' House had to consider how far evidence of drunkenness could be taken into consideration in order to determine whether the accused had the necessary intent." But the " necessary intent " under consideration in *Beard* was merely the intent to commit the felony of rape, since *Beard* turned on the felony-murder rule, not on the rule concerning grievous bodily harm. Lord Kilmuir cites it as though it were a case on the intent to cause grievous bodily harm.

It is, perhaps, worth devoting a little more space to the way in which Viscount Kilmuir treated the authority of *Beard*. He quoted a passage from Lord Birkenhead's speech which, boiled down, amounts to a denial of the proposition " that the test of the condition of mind of the prisoner is not whether he was incapable of forming the intent but whether he was incapable of foreseeing or measuring the consequences of his act." Eliminating the negatives, this means that the condition of mind of the accused is relevant on the question whether he was incapable of forming the intent required by law for the crime, but not on the question whether he was incapable of foreseeing or measuring the consequences of his act. Taken out of context, the last proposition is too widely stated. If a man is, by reason of drunkenness or otherwise, incapable of foreseeing a particular consequence of his act, it follows that he is incapable of intending that consequence, for there can be no intention without foresight. What Lord Birkenhead must have meant is that, on a charge of crime requiring intention, drunkenness may negative the intention, but *except as negativing such intention* it is irrelevant to the issue. At any rate, this is the view that is consistent with the tenor of his speech as a whole. As every law student knows, what Lord Birkenhead was saying was this: where the form of malice aforethought relied on by the Crown was intent to do grievous bodily harm, evidence of drunkenness might show that there was no such intent, as *Meade* had decided. But where, as in *Beard*, the prosecution relied on the felony-murder rule, evidence of drunkenness could not be relevant—unless of course it negatived

22 [1956] Crim.L.R. 379.
23 19 M.L.R. 415–416.
24 [1920] A.C. 479.

the intent to commit the particular felony; in *Beard*, where the felony was rape, it would have been practically impossible to show that the drunkenness negatived the rape, for it is difficult to imagine how a man can commit an act of rape without an intent to rape. (Actually, such a case could arise if there were an issue of mistake as to the woman's consent, and here drunkenness might well be relevant; but that was not the issue in *Beard*.)

As said already, these propositions in *Beard* relating to the felony-murder rule are of no interest in modern law. All that matters is that Lord Birkenhead recognised the authority of *Meade*, which had regarded the accused's state of mind as relevant when the charge was based on an intent to do grievous bodily harm. Lord Birkenhead's explanation of the law on this point finds no place in the judgment of the House of Lords in *Smith*; it was, however, very apposite, and is worth reproducing here. The italics are mine.

> "Where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime *which was committed only if the intent were proved*. This does not mean that the drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of that crime. In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm, unlawful homicide with malice aforethought is not established and he cannot be convicted of murder."

Lord Kilmuir had three decisions of the Court of Criminal Appeal on which to rely in support of his opinion: *Philpot*,[25] *Ward* and *Vickers*. But the Court of Criminal Appeal itself had not regarded these decisions as leading to a conviction for murder in the instant case, for that court had quashed the conviction. There was at least one other indication that the court had repented of its earlier pronouncements, perhaps bowing before the weight of criticism. In *Pennington*,[26] facts occurred very similar to those in *Ward*, yet a conviction for murder was quashed. Although the court did not reinterpret the law, it seems to have applied the law more indulgently than before. And its judgment in *Smith* was in effect a complete repudiation of the rule in *Ward*. If one turns to

[25] (1912) 7 Cr.App.R. 140, 141 (C.C.A).
[26] [1958] Crim.L.R. 690.

overseas authorities, the High Court of Australia had decisively rejected *Ward* in its judgment in *Smythe*.[27]

Authorities for the subjective approach to malice aforethought

Viscount Kilmuir seems to have thought that the subjective approach to malice aforethought was practically devoid of authority, for he said that " the only case which could possibly be said to support the view taken by the Court of Criminal Appeal in the present case is *R.* v. *Vamplew*." [28] In fact, as Mr. Prevezer had previously pointed out,[29] there is a good deal of authority besides *Vamplew*. Mr. Prevezer himself referred to *Horsey* [30] and *Bancroft*.[31] In addition, there is *Walters* (1841),[32] where Coltman J. directed the jury that it was not murder " if the circumstances are not such that the party must have been aware that the result would be death." In *Errington* (1838) [33] the judge had accepted an " intent to do serious injury " as sufficient, but he did not say that this intent was to be fictitiously presumed. The act done (covering the sleeping victim with straw, and throwing hot cinders on his belly) was highly dangerous; yet the judge's direction in terms of intent left the jury the opportunity of returning a verdict of manslaughter, which they did. In *Macklin* (1838) [34] Alderson B. directed the jury that the question in every case was whether there was an intent to kill; the use of a deadly weapon, or of continued violence, might show such intention, but apparently in his view was only evidence of it.

In view of these authorities, which are not by any means an exhaustive list, it seems to be a tenable generalisation to say that during the nineteenth century the objective test of responsibility in murder (the foresight of the reasonable man) was not applied where the intent relied on by the prosecution was an intent to kill or cause grievous bodily harm. It was applied in cases like *Lumley* (and earlier cases to the same effect), but only within the limits of the felony-murder rule by way of restriction upon that rule. Had the objective test been applied outside the felony-murder rule, there would have been little point in the latter rule, because, as said already, in practically every case of a violent felony resulting in death the accused has done something from which a reasonable man would foresee the likelihood of grievous bodily harm.

Illustrations of the same attitude can be found in the present century. In *Rattenbury* (1935),[35] Humphreys J. directed the jury

27 (1957) 98 C.L.R. 163.
28 (1862) 3 F. & F. 520.
29 [1956] Crim.L.R. 381 *et seq.*
30 (1862) 3 F. & F. 287, 288n.
31 *Manchester Guardian*, December 2, 1955.
32 C. & M. 164.
33 2 Lew. 217.
34 2 Lew. 225.
35 *The Trial of Rattenbury and Stoner*, edited by F. Tennyson Jesse (London, 1935), 255–256.

in terms of hitting a man with intent to cause serious bodily injury, which, he said, would constitute a felonious wounding, and would make a consequential death the crime of murder. There is nothing here about presuming the intent to cause serious injury. In *Bloom*,[36] McNair J. directed the jury that " there must be, to prove murder, proof of a wicked intention at the time either to kill or to do grievous bodily harm." The use of the word " wicked " pretty clearly rules out any question of legal fiction.

True, these are only directions by trial judges, as was *Vamplew*; but they show that the House of Lords was completely mistaken in supposing that *Vamplew* stood alone. Moreover, a continuous tradition of direction by trial judges in favour of the accused over a period of more than a century should surely be entitled to weight in the eyes of an appellate court. But we have not yet done with our authorities, for similar language is not wanting in judgments of the Court of Criminal Appeal, delivered in the days before it diverged from this path in *Ward*. In *Cobbett*,[37] for example, that court said that it is murder if the accused deals a blow " with intent to cause grievous bodily harm." This is surely something quite different from saying that it is murder if the accused acts in circumstances that would cause an ordinary person to foresee the likelihood of harm. But strongest of all is the decision in *Meade*,[38] which is explicitly in point and is not rationally explicable save in terms of the subjective theory. Viscount Kilmuir referred to this case, but he restricted it, as will be shown, in an extraordinary way.

The decision of the House of Lords as a revival of constructive malice

The marginal note to section 1 of the Homicide Act announces the " abolition of ' constructive malice,' " and since it is agreed that the Act did not abolish the form of malice consisting in an intent to inflict grievous bodily harm, it is sometimes said (as by the Court of Criminal Appeal in *Vickers*) that this last form of malice is not " constructive " but " implied." This, it is true, seems to have been the distinction intended by the draftsman of the Homicide Act. At the same time, many will think that it is juggling with words. An intention to kill is not genuinely " implied " if the court is satisfied that no such intention existed. Even under the felony-murder rule, which everyone agrees was a form of constructive malice, there had to be an intention of some sort, namely an intention to commit the felony; the intention was, however, " constructive " because there was no intention to kill. Since the primary meaning of " malice aforethought " in murder is an intention to kill, all forms of malice that do not require an

[36] *The Times*, February 7, 1952.
[37] (1940) 28 Cr.App.R. at 13.
[38] [1909] 1 K.B. 895 (C.C.A.).

intention to kill are constructive. For, as Sir Patrick Devlin wrote, "I take an intent to be constructive when there is imputed to a man a state of mind other than his actual state of mind." [39]

In view of the decision in *Smith*, which reduces the mental element in murder to a mere intention to act unlawfully in respect of someone, there can hardly be any argument that a doctrine of constructive malice still flourishes in the law of murder. A man can now commit murder without an intent to kill, and without an intent to harm; he can commit murder by mere negligence. It is true that he must intend to commit *some* crime,[40] but in respect of the consequence of death it is sufficient that he was negligent.

The political aspects of the decision

Although reference to parliamentary proceedings is taboo in court, it is a serious matter if, when a legislative compromise is reached after months of debate between opposing political forces, the courts should give an interpretation to the measure which defeats the assumption upon which it was enacted.

During questions in the Commons, Mr. Silverman raised the decision in *Vickers* and suggested that it was inconsistent with assurances given during the passage of the Homicide Bill. The Attorney-General replied: "Mr. Silverman is quite wrong. Throughout the debates we made perfectly clear that the intent necessary to constitute murder was either an intent to kill or an intent to do grievous bodily harm." [41] Accepting this reply, it now becomes just as clear that the decision of the House of Lords upsets the basis upon which the Homicide Act was passed. For an intent to kill or do grievous bodily harm is no longer necessary.

The Wider Implications of the Decision: the Test of Foresight on an Issue of Recklessness

Reference has already been made to Viscount Kilmuir's use of the passage from Holmes and of the *obiter dictum* in *Faulkner* for the proposition that the test of foresight is objective. If this proposition comes to be accepted for criminal law generally, it will have an effect the gravity of which can hardly be stressed too strongly, for it will introduce objective liability into all statutory crimes of malice, and all other crimes in which recklessness is an element. Before accepting this wholesale reversal of the accepted canons of the criminal law, it is worth looking closely at the reasons put forward in support of objective liability.

In the passage from Holmes, quoted by Viscount Kilmuir, no reason is given. Holmes merely asserts that for the purpose of the

[39] [1954] Crim.L.R. 668.

[40] Though even this restriction rests upon a somewhat oblique inference: above, note 7.

[41] The statement is reported in *Hansard* for July 17, 1957, and in *The Times* the next day.

criminal law the question whether the accused foresaw a consequence is the same as the question whether a man of reasonable foresight could have foreseen it. This startling proposition needs some justification.

The only possible justification is the impossibility of looking directly into the accused person's mind. We may grant that the accused's intent, knowledge and foresight can be inferred only from his own words and conduct, whether at the time or subsequently, though such words and conduct may be interpreted in the light of everyday experience. But this is a very different thing from forcing an equiparation between the accused's state of mind and the assumed state of mind of some other person who is imagined to stand in his shoes.

In respect of knowledge we do not make this equiparation. Questions of the accused's knowledge, where that is in issue, relate to his own state of mind; he is not credited with all the knowledge of the ordinary man. It is true that the jury may be ready to suppose that he knows what is common knowledge, but this is different from a rule of law fictitiously attributing common knowledge to him.

It may be admitted that proof of the foresight necessary for subjective recklessness is more difficult than proof of the knowledge of existing facts, just as it is more difficult than proof of intention. When a man is charged, say, with knowingly possessing explosives, the crime is committed over a fairly extensive period of time and there is some opportunity to find circumstantial evidence of knowledge. Similarly, when a man plots and prepares to commit a crime, he will often leave evidence of tell-tale pieces of behaviour which are inexplicable except on the assumption that he intended the result. But the foresight of possible consequence involved in recklessness may be a mere passing realisation, instantly dismissed, which leaves no mark upon conduct. Also, a man is capable of self-deception; he may decide that an unpleasant result is not likely because he does not want it to be likely.

These considerations mean that recklessness on a subjective definition is a concept of limited practical application. Although it enlarges criminal responsibility slightly to add responsibility for recklessness to responsibility for unlawful intention, the enlargement is not great. However, that is not in itself a reason for widening the concept of recklessness. Indeed, by widening the concept of recklessness you do not make it more useful; you destroy it, because, by declaring that a man is to be deemed to foresee what he ought to have foreseen, you merge recklessness into negligence. If the law is to create criminal responsibility for negligence, let it say so, not smuggle in such extended responsibility through a doctrine of constructive recklessness and constructive foresight. To do the latter is not only to widen the criminal

law enormously without debating the issue of policy, but also to deprive us of the concept of recklessness.

There is a way in which the test of ordinary foresight is legitimately used in the issue of recklessness, but it is not the same as that stated by Lord Kilmuir. Take two hypothetical cases. First, a man throws a brick in the direction of a plate-glass window and breaks it. If that is all, you say that he must have foreseen that the window would be broken, and must, indeed, have intended to break it, for otherwise why did he throw the brick? But, secondly, suppose there was a rough fight going on; things were being thrown about; and the man threw the brick in the direction of an opponent, who was standing just in front of the window. This time you will probably not be sure that there was an intention to break the window, or even foresight of the possibility; in fact, you may be pretty sure that there was not. The intention was to injure an opponent, and the accused was blind to everything else.

There is no objection to instructing the jury to consider whether the defendant *must* have foreseen the consequence, but it is fatally easy to confuse this with the question whether the defendant *ought* as a reasonable man to have foreseen it. The latter question presupposes an objective test of the reasonable man, and the accused person's actual foresight is immaterial. The former question is directed exclusively to the accused's actual foresight, and the test of what a reasonable man would have foreseen is merely a step in reasoning. For example, it may be shown that the accused is mentally subnormal,[41a] or that on the occasion in question he was drunk, or suffering from some fear, anger or other excitement which deprived him of the ability to look circumspectly to the probable outcome of his conduct. These facts would not be relevant to an issue of inadvertent negligence, but they are very relevant to the issue of foresight in recklessness.

It is submitted that this view is consistent with the great weight of authority. There is perhaps some confusion upon it in the judgment of Lord Coleridge C.J. in the well-known case of *Pembliton*.[42] The outcome of *Pembliton* was satisfactory, but the same cannot be said of *Welch*.[43] There, the jury convicted of an offence of recklessness in injuring a mare because an ordinary person would have foreseen an injury; yet it seems from the facts that the accused did not foresee it but thought he was affording the mare sexual gratification.

That the objective view is not adopted by the courts in statutory crimes of malice appears most clearly from the cases on arson. In cases like *Child*,[44] where a lodger made a large bonfire of chattels

41a But it is submitted that evidence of mental subnormality would amount to a defence of insanity, success in which would result in a verdict of insanity, not an ordinary acquittal.

42 (1874) L.R. 2 C.C.R. 119.

43 (1875) 1 Q.B.D. 23 (C.C.R.).

44 (1871) L.R. 1 C.C.R. 307. *Cf. Nattrass* (1882) C.C.C. Sess. Pap. xcv, 520.

inside the dwelling-house, it seems obvious that an ordinary person would have foreseen the likelihood of the dwelling-house being set on fire; but the jury were instructed in terms of the subjective theory of recklessness, and the accused was acquitted on their finding of absence of malice.[45] There seems little doubt that on the facts the jury would have been entitled to find intention or recklessness; but the point is that the state of the accused's mind was left to them as a matter for their determination without compulsive presumptions. The subjective test also appears quite clearly in the judgment of the Court of Criminal Appeal in *Cunningham*, which has already been referred to.

The Objective Theory in Relation to Intention

However cogently it may be shown that the judgment in *Smith* departs from the previous understanding of the law, the possibility remains that it heralds an era of "objective" criminal responsibility, superseding the need for proving a real *mens rea* even in crimes of gravity. If this happens, it is not too much to say that it will be a disaster for English law of the first magnitude. The crux of the matter is the validity of the maxim that a man is presumed to intend the natural consequences of his acts. The judgment in *Smith* supports the maxim, but the extent of the support is not altogether clear.

The objection to the use of the maxim in instructing juries is that it gives a misleading impression of the law unless accompanied by a sophisticated explanation. Instead of using this maxim, the jury should be told that they are entitled to draw inferences as to the defendant's intention from what he did, but that if they have a reasonable doubt as to his intention they must find for the defendant. The use of the older type of direction was disapproved by the Manitoba Court of Appeal in a notable judgment. It was given on an appeal from a conviction for murder, where the defence had been one of drunkenness negativing the intent to kill. The court said:

> "The learned judge, on more than one occasion during his address, dwelt upon the fact that a man is presumed to intend the natural consequences of his acts, as if it had some probative value in determining the capacity of the accused. Whether or not there was a doubt as to the capacity of the accused was a matter to be decided on the evidence. When direct positive evidence is given of lack of capacity, that can be met only by evidence rebutting it; the presumption is no longer valid. The presumption has no value against positive

[45] The house was not burned, but the report says that it almost certainly would have been burned had not the police succeeded in extinguishing the bonfire in time. The accused was indicted under the O.A.P.A., 1861, s. 7, and it was held that he could not be convicted for burning the chattels under this section unless he had the requisite malice in respect of the building.

> evidence. When, therefore, the learned trial judge said: 'The Crown has in its aid in the proof of intent the presumption in law which I have read to you,' it was a misdirection." [46]

This decision does not completely exclude reference to the supposed presumption in instructing juries, but it would obviously be far better if it were excluded. In *Smith*, the trial judge had referred to the presumption and the House of Lords refused to regard this as invalidating the conviction; but the judgment of the House does suggest that the presumption might well be omitted in summing up to a jury. This is good as far as it goes, but Viscount Kilmuir added: "In my opinion, the test of the reasonable man, properly understood, is a simpler criterion. It should present no difficulty to a jury and contains all the necessary ingredients of malice aforethought." This passage is innocuous in itself, but, as will be shown in a moment, it is clear from another part of the Lord Chancellor's speech that he regarded the test of the reasonable man as creating in most circumstances an irrebuttable presumption. In the sentence just quoted, the concluding reference to malice aforethought may suggest that the Lord Chancellor was referring to the crime of murder only, and was merely restating the *ratio decidendi* of the case in respect of the doctrine of constructive malice. If the suggestion is that in all criminal cases the question of intent is to be determined in terms of the foresight of the reasonable man, thus reducing all crimes of intention to crimes of negligence, the prospect is alarming indeed.

It may be replied to this that Viscount Kilmuir was not referring to the standard of care in negligence, and that his use of the term "reasonable man" in the sentence just quoted must be understood in the light of a previous remark. Earlier in his judgment he adverted to the fact that the expression "a reasonable man" connotes to lawyers the man on the Clapham omnibus by reference to whom a standard of care in civil cases is ascertained, whereas "in judging of intent, it really denotes an ordinary man capable of reasoning who is responsible and accountable for his actions, and this would be the sense in which it would be understood by a jury." Now it is to be observed that the test of the reasonable man is used for criminal as well as civil negligence, though it is thought that in criminal cases there must be a grosser departure from the standard of the reasonable man to constitute negligence than in civil cases. To put this in another way, the reasonable man of the criminal law has a lower standard of behaviour than the reasonable man who is the standard of the civil law; he is, in fact, very much the ordinary man, rather than the ideal citizen pictured by the civil courts. If this is so, we come back to the proposition that to judge questions of criminal intent

[46] *Malanik* [1951] 1 W.W.R.(N.S.) 561; 11 C.R. 443; 100 C.C.C. 28. *Cf. Smythe* (1957) 98 C.L.R. 163.

exclusively by reference to the foresight of the ordinary man is practically tantamount to using the same test for criminal intent as for criminal negligence.

One would like to think that, in using the test of the reasonable man, the Lord Chancellor was merely allowing some prima facie inference of what passed in the accused's mind. But, unfortunately, his words preclude this interpretation. In reply to the argument that the jury should have been told that the presumption of intent was rebuttable, Viscount Kilmuir said: "In truth, this [*i.e.*, the presumption of intent] is merely another way of applying the test of the reasonable man. Provided that the presumption is applied, once the accused's knowledge of the circumstances and the nature of his acts has been ascertained, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility. In the present case, therefore, there was no need to explain to the jury that the presumption was rebuttable."

This passage appears to mean that although counsel for the defence is allowed to show that the accused *could* not form the intent, he is not allowed to show that though the accused could form it he did not. Viscount Kilmuir did not think it necessary to explain the reason for this distinction. Surely, in a criminal case where intention is in issue, the question should be whether the accused did have the intention. The fact that he was incapable of having it is a particularly strong way of showing that he did not have it; but why should not other evidence that he did not have it be admissible?

The Exception for Drunkenness

The rule stated by Viscount Kilmuir may be tested by considering its concrete application. According to the rule, in the circumstances stated, the only thing that could rebut the presumption would be proof of incapacity to form an intent, insanity or diminished responsibility. The reference to insanity is presumably to the ordinary defence under the M'Naughten Rules, and diminished responsibility is a statutory defence. This leaves us with incapacity to form an intent. Perhaps this refers to children under fourteen, but they are taken care of by their own rule of law and it is more likely that Viscount Kilmuir was thinking of drunkenness. The interpretation is supported by the fact that the noble lord had shortly before been considering *Meade* [47] and *Beard*,[48] the two well-known cases on the rebuttal of intent by proof of drunkenness. It may be taken, then, that the presumption of intent may be rebutted by proof of drunkenness which satisfies the jury that the accused did not have the intent—or, rather, which

[47] [1909] 1 K.B. 895.
[48] [1920] A.C. 479.

leaves the jury in reasonable doubt whether he had it or not. This is satisfactory in itself; but why allow only drunkards to bring out the real truth of the matter? Why bind everyone else by an irrebuttable presumption of law, which means a legal fiction? Drunkenness is merely one kind of circumstantial evidence tending to negative intent. But there are many other such circumstances: in particular, evidence that the accused was really directing himself towards a different object, and inflicted the mischief in question only by accident. In *Smith*, the evidence made it obvious that the accused did not set out to kill the policeman. He was trying to escape, and for this purpose he tried to shake the policeman off. His obvious purpose explains and renders intelligible the whole of his conduct. It is not a case where you say: "He must have intended to kill the policeman, because otherwise why did he do it?" It is not even clear from such facts that he must have foreseen the probability of serious harm; and, in any case, foresight that a result is probable is not the same as intending it. What Smith did was to create a risk; but creating a risk of death should fall within the law of manslaughter, not murder. To use an irrebuttable presumption in a case like this creates a fiction of the most revolting kind. It is a fiction that might have been expected in the age before Bentham, but comes badly from judges of the twentieth century.

If the decision has any plausibility, it is because the accused was engaged in resisting arrest by dangerous methods. But, at the risk of repetition, it may perhaps be said that the presumption of intent laid down by the House of Lords is not confined to these circumstances. Take the following hypothetical facts. A and B dress themselves up in grass hula skirts, and caper about; A, in the excitement of the moment and merely to add to the merriment, sets fire to B's skirt; and B dies in the blaze.[48a] No one, surely, would regard A as morally a murderer; yet that is what he is under the rule laid down by the House of Lords. The only thing that could save A from conviction for murder under this rule would be evidence that he was inebriated. Evidence of the intoxicating effect of music and merriment would be of no avail.

The limited exception accorded by Viscount Kilmuir for drunkenness appears to be due, as must be said with respect, to a misreading of the sentence which he had quoted from Lord Birkenhead's speech in *Beard*. It is true that, in the course of his speech in that case, Lord Birkenhead referred to evidence of drunkenness to show that the accused was incapable of forming the intent required by law. But it is illegitimate to infer from this that evidence of incapacity is the only way of rebutting the so-called presumption of intent. In the passage quoted earlier in this

[48a] The case is suggested by one that came before the New Zealand courts a few years ago, but there the defendant was able to prove that the affair was an accident.

article,[49] Lord Birkenhead pointed out that the relevance of the state of drunkenness is merely that it "may be incompatible with the actual crime charged and may therefore negative the commission of that crime"; and he pointed out that drunkenness in itself was not an excuse for crime. These words surely lead to the conclusion that *any* evidence is admissible if it is incompatible with the crime charged and therefore negatives the commission of that crime; drunkenness, not being in itself an excuse, is merely a type of such evidence. Yet Lord Kilmuir has found in *Beard* the rule that *only* evidence of total incapacity is admissible. Let there be no confusion between the words "incapacity" and "incompatibility"; evidence of incapacity of mind is, of course, something much more limited than evidence incompatible with the alleged intent.

In *Smith*, the House of Lords did not only rule out of consideration the fact that the accused was endeavouring to escape arrest. The effect of creating the irrebuttable presumption was also to deny the relevance of the evidence relating to his conduct immediately after the disaster. Having turned down a side street and dumped the stolen goods, Smith immediately returned to enquire after the policeman and gave himself up, expressing the greatest concern—"I knew the man. I wouldn't do it for the world. I only wanted to shake him off." In the police car he kept muttering to himself, as he repeated in the witness box, "It is a terrible thing. I know his family and I know he has kids." Protestations by criminals that they did not mean to do it are often unconvincing, but many will think the evidence of Smith's demeanour immediately after the tragedy persuasive towards the conclusion that he did not intend to do the constable serious harm.[49a]

The Impact of the Decision on the Criminal Law

It is the custom, in criticising the judgments of English courts, if one permits oneself criticism at all, to exercise great restraint. This is not only the result of the law of contempt of court; it is also part

[49] See p. 615.

[49a] The speed to which Smith accelerated is of importance in judging his culpability. Witnesses assessed it at moderate to fast, and one witness put it at 30–50 m.p.h. (the judgment in the House of Lords incorrectly reports this as 30–60 m.p.h.). When Smith gave evidence, among unconvincing protestations that he did not know the policeman was still there, he stuck consistently if casually to one fact: that he never left bottom gear. Since the whole affair took only ten seconds and covered only 100 yards, and since he evidently tried to shake the policeman off by accelerating and swerving, I do not think that this statement of his is impossible of credence. But, if so, the uncontradicted expert evidence was that he could not have been going above 23 m.p.h. in that gear.

Perhaps the most serious evidence against Smith was the inferential fact that the unfortunate policeman had come into contact with three cars travelling in the opposite direction while he was still clinging to Smith's car. This might have been the result of Smith's efforts to zig-zag in a fairly narrow traffic lane. If the severe conclusion were to be drawn that Smith intended to crush the

of the tradition of the Bar to uphold the dignity of the judges and to use the utmost courtesy and moderation in the expression of differences of opinion. At the same time, the public interest occasionally requires a sharper edge to be put upon criticism. In this instance, the judgment of the supreme appellate tribunal, with its totally inadequate examination of the authorities—even the judicial authorities; its unfortunate presentation of some of them; its citation of cases on a defunct rule as though they were apposite law; but, above all, as most will think, in its insistence upon legal fiction and irrebuttable presumption in relation to the most serious crime, setting itself in opposition to the movement of thought that has been going on since the time of Bentham, and in opposition to the opinion of the Court of Criminal Appeal itself—in all these respects the judgment simply will not do.

Lawyers still remember with gratitude one of the interventions made by the House in the field of criminal law, when, in a judgment of meticulous care and scholarship, it reaffirmed the "golden thread" running through the law that the burden of proof rests on the prosecution, and set the Court of Criminal Appeal free from bondage to mistaken precedent.[50] But where is the golden thread now? The prosecution is apparently furnished not merely with a rebuttable presumption of law on the subject of intent—which would be bad enough—but with a presumption that in all circumstances save drunkenness is apparently intended to be irrebuttable.

In order to minimise the effect of *Smith*, it may be hoped that at least it will be confined to the crime of murder, in which particular context it may receive the attention of Parliament, and not allowed to alter the attitude to questions of intent in criminal law generally, which would be much harder to reverse by Act of Parliament—for matters relating to fundamental conceptions are not easy to state in statutory form.

On this view, we may say that (1) drunkenness may rebut the presumption of intent in murder, so that *Meade* is still good law, but practically no other evidence will do so; whereas (2) in crimes other than murder the courts are free to instruct juries as to intention in fact, disregarding the presumption. In crimes other than murder, the judge may still explain precisely to a jury the difference between a consequence that is intended and one that is merely likely. The jury may be asked whether they are satisfied that the accused *must* have foreseen and intended the consequence, *i.e.*, whether it is the only reasonable interpretation of his conduct. But there is a world of difference between asking whether the accused *must* have foreseen the consequence and whether he *ought* to have foreseen it. The question "must" is an attempt to look

policeman against the oncoming cars, an inference of intent to kill would be practically irresistible; but neither at the trial nor in the House of Lords did the case proceed on the footing that Smith intended to kill.

50 *Woolmington* v. *D. P. P.* [1935] A.C. 462.

into the mind of the accused as revealed by his conduct. The question " ought " imposes upon the accused the objective standard of the reasonable man; and it is relevant only to issues of negligence, not to issues of intention.

That this view of the position is the correct one may be supported by a number of arguments. Although Viscount Kilmuir did not make it clear during his speech to what extent he was thinking of murder only and to what extent he intended to lay down general propositions of the criminal law (sometimes referring to malice aforethought and sometimes to foresight and intent generally), the fact is that he did not purport to overrule cases like *Steane* [51] in which it was held that the presumption of intent did not displace the need to direct the jury that the burden was on the prosecution to prove intent on the totality of the evidence. Viscount Kilmuir dealt with cases of this type by distinguishing them; he described them as cases where " over and above the presumed intent there had to be proved an actual intent." Taken by itself, this dictum invites judges to divide crimes of intention into two classes: those of fictitiously presumed intent, where the presumption is rebuttable only if the accused is lucky enough to have been drunk, and those of real intent. One would have thought that " intent " in the criminal law ought always to refer to real intent, not to a legal fiction. At any rate, there is nothing to compel a court to put any crime into the fictitious category except, now, murder.

Viscount Kilmuir's meaning on this topic is made more obscure by his use of the specially coined expression " overall intent." When a judge introduces a new technical term into his judgment it would be convenient to have a definition of it, but in this case the meaning is left to be gathered from the context. In the course of discussing Denning L.J.'s opinion in *Hosegood* v. *Hosegood*, the Lord Chancellor clearly intimates that he is using the phrase " overall intent " as synonymous with " actual intent " (" the words in that passage were being used in connection with a case where an actual or overall intent or desire was involved "), and to this intent, the Lord Chancellor says, the irrebuttable presumption does not apply. However, he goes on to say that " no such overall intent or desire is involved in the consideration of intent to kill or to do grievous bodily harm. Thus an overall intent or desire, for example, an intent or desire to escape, could not afford any defence." It is, of course, true that an intent to escape arrest could not afford a defence if there is an intention to kill, but one finds it hard to see the relevance of the remark to what has gone before. If the essentials of a crime are proved, the existence of some ulterior motive never is a defence—except in certain rare situations of necessity. Obviously, an intent to escape justice

[51] [1947] K.B. 997.

never could form an excuse for any crime. So, if this is the test of a " crime of overall intent," there exists no crime of overall intent. But in any case the expression appears to have no utility.

The view here being advanced, that the decision in *Smith* should be regarded as confined to the crime of murder, is supported by the known opinions of two of the other Law Lords who contented themselves with a simple concurrence in the Lord Chancellor's speech. Among these others were Lord Denning and Lord Goddard. Lord Denning's views about the presumption of intention are well known, in particular his remark that " there is no ' must ' about it; it is only ' may.' " [52] If Lord Denning has changed his mind about this, one would have expected him to say so; the fact that he did not may fairly be taken as supporting the view that *Smith* was not intended to have a general operation in relation to the ascertainment of intention. The same holds for Lord Goddard, who delivered the judgment in *Steane* which we may still take as the leading authority on the subject.

It must be confessed, however, that Lord Goddard's opinion on the law of murder is now somewhat mysterious. During the course of argument in *Smith*, when counsel for the defendant strongly contended that there are many cases where the criminal courts do take account of intention, Lord Goddard interposed to say that he agreed that once the defendant had given evidence the jury had to take the totality of the evidence (this was the language he had used in *Steane*), but, he added, the prosecution could never establish a case to go to the jury as to a man's intention except by saying: Look at what the ordinary man would do. Lord Goddard asked: if one left out the test of the reasonable man, where would there be any yardstick? Talking to a jury about subjective and objective tended only to confuse them.[53]

On my understanding of this remark, it means that the test of what a reasonable man would have intended is merely a guide to what the accused person probably intended, and it is the second question that the jury has to decide on the totality of the evidence. However, acceptance of this view would have involved upholding the judgment of the Court of Criminal Appeal. Lord Kilmuir's speech, with which Lord Goddard expressed concurrence, is to a totally different effect. According to Lord Kilmuir, the question is one of probable consequence, and " the only test available for this is what the ordinary responsible man would have contemplated." Moreover, the noble lord expressly held that the presumption of intention was irrebuttable except in certain restricted ways; and he held that the attitude of the court in *Steane* was inapplicable to the crime of murder—with all of which Lord Goddard sat silently concurring.

[52] *Hosegood* v. *Hosegood* [1950] 1 T.L.R. 735.
[53] *The Times*, June 30, 1960.

The Problem of Reform

The decision in *Smith* will probably be with us for many a long day, except in the unlikely event of the Government being moved to introduce its own measure on the subject. But it may be that at some time the question of legislation will be considered, and I hope that when that time comes we shall have done with the moderates and require in every case of murder an intention to kill.

It is true that this definition may make it difficult to convict of murder one who, in a fight, shoots at another person and causes his death, without having any demonstrable motive for killing. If he says that he intended only to wound, he may have to be given the benefit of the doubt. But this result need not cause perturbation, for the maximum punishment for manslaughter is perfectly adequate for a case of this type.

The present law operates absurdly in relation to capital punishment. Most people would say that a man who intentionally kills another by way of revenge deserves to hang more than the killer who intended only to inflict grievous harm. Yet the former does not commit capital murder, while the latter does so if he was acting in the course of theft. The removal of the grievous harm rule from the law of murder would correct this anomaly.

If any form of constructive malice is retained, it should be limited to cases where the accused actually intends to inflict an injury upon his victim (not merely the risk of injury) which he knows is likely to cause death. Admittedly, it may be difficult to satisfy a jury of such knowledge, but the definition is intended to be a restricted one. The trouble with any definition in this field is that in cases where emotions are deeply involved there is frequently a temptation to stretch the definition.

Although there may be a strong temptation to extend the law of murder in order to protect the police, it is submitted that there is a moral distinction between the criminal who deliberately shoots a policeman through the head and the criminal who, trying to escape in a car, and seeing the road blocked by a policeman, drives at the policeman in the hope of making him jump out of the way, but realising that if he does not jump he will be seriously hurt or killed. To say that the second case is murder if death results is to turn it at the same time into capital murder; but this view fails to restrict capital murder in the way that the Homicide Act evidently intended.

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THE GENESIS OF THE FLOATING CHARGE

THE floating charge on a company's assets is so familiar a form of security for a loan today that it is surprising to realise how recently it first received legal recognition as the result of a group of Chancery decisions in the 1870s.[1] It is moreover surprising to discover that it is a form of security peculiar to the legal systems of the British Commonwealth,[2] although, as will be shown below, it had a precursor in Roman law. The purpose of this article is to trace the development of English common law and equity during the nineteenth century so as to segregate the many factors which ultimately led to the recognition of the floating charge, and to examine the two conflicting theories which the courts have expounded as to its nature.

1. COMMERCIAL NEEDS AND THE COMMON LAW

By the third decade of the nineteenth century industrial and commercial expansion had become so rapid that the constant crying need of companies was for more capital. In the case of the larger companies incorporated by Act of Parliament to manage railway, canal and public utility undertakings, much of this need could be satisfied by offering shares for subscription, but the smaller unincorporated companies, which carried most of the burden of the industrial revolution, either would not [3] or could not induce investors to subscribe for their shares on a large enough scale, and a large part of their capital was consequently raised in the form of loans. At first investors seemed content to take the companies' bonds for repayment of their loans, and relied for their security on the priority given to them by law over the shareholders in the event of a liquidation. The bond was a form of investment which had been familiar for over a hundred years, and on the whole bondholders had in the past recovered their loans in full when companies foundered. But the much increased tempo of activity of the industrial revolution brought with it a vast expansion of credit for

[1] *Re Panama, New Zealand and Australian Royal Mail Co.* (1870) 5 Ch.App. 318; *Re Florence Land and Public Works Co., ex p. Moor* (1878) 10 Ch.D. 530; *Moor* v. *Anglo-Italian Bank* (1878) 10 Ch.D. 681; *Re Hamilton's Windsor Ironworks Co., ex p. Pitman and Edwards* (1879) 12 Ch.D. 707; *Re Colonial Trusts Corporation, ex p. Bradshaw* (1879) 15 Ch.D. 465.

[2] Floating charges are not recognised by Scots law (*Carse* v. *Coppen*, 1951 S.C. 233), nor, until recently, by American law, which adopted the same position as the common law of this country during the last century (*Benedict* v. *Ratner* (1925) 268 U.S. 353). In those states of the U.S.A. which have adopted article 9 of the Uniform Commercial Code, however, it is now possible for floating charges to be created, but they do not yet appear to be widely used.

[3] Such companies were often family concerns, and the introduction of outside shareholders would diminish the voting power and control of the family. Non-voting shares were unknown at this time.

current transactions, such as the purchase of raw materials and the carriage of finished goods, so that when a company failed, bondholders often found that other creditors had claims to be satisfied rateably with their own,[4] and if the company's assets were insufficient to pay all the claims in full, the bondholders went partly unpaid. To overcome this risk, investors who supplied long-term loan capital [5] came to insist on better security for their loans, but the problem was, what security could the company legally give them?

The forms of security available at common law were the mortgage of land or goods and the pledge of goods. Under a mortgage the ownership of the mortgaged property was transferred to the lender so that on default by the borrower he could sell the property and discharge his loan,[6] but until the lender took steps to realise his security possession of the property was retained by the borrower. Under a pledge the ownership of the goods was retained by the borrower, but the lender took and kept possession of them until the loan was repaid and had an implied contractual right to sell them on default by the borrower.

These forms of security did not meet the needs of companies. The greater part of a company's assets would usually comprise raw materials, manufactured or semi-manufactured goods, stock in trade and trade debts payable to it, and its land, buildings and fixed equipment would often form a mere fraction of the value of its undertaking. But the forms of security available at common law permitted it to raise money only on the security of these latter fixed assets, and prevented it from giving an effective security over its other assets, which commercially were its soundest potential for raising loans. The reason for this, apart from the fact that the common law, unlike equity, did not recognise assignments or mortgages of debts owed to the company, was that the current or circulating assets of a company were constantly changing, and the common law insisted that mortgages or pledges should be of land or goods owned by the company and identified at the time the mortgage or pledge was created. Now this was a practical impossibility in the case of a class of assets the constituent items of which were constantly changing. If the precept of the common law were

[4] Until 1856 unincorporated companies and companies formed under the first Joint Stock Companies Act of 1844 (7 & 8 Vict. c. 110) could be wound up by the Courts of Bankruptcy. The rule giving bond creditors priority over simple contract creditors, which applied in the administration of deceased persons' estates until 1869, never applied in bankruptcy, and so bondholders of a company enjoyed no preference over trade creditors.

[5] At this time loan capital was rarely raised for a period of more than five or six years. It was not until the last quarter of the nineteenth century that debentures redeemable as much as twenty or twenty-five years after issue began to appear.

[6] The mortgagee's ownership was subject to the mortgagor's equitable right to redeem, and so an express power of sale was always inserted in the mortgage to enable the mortgagee to sell the property free from the equity of redemption.

carried out, there would have to be a fresh mortgage or pledge each time a new item was added to the class of assets, and a release by the lender each time an item was disposed of out of it.

The common law was founded on Bacon's *Maxims*, regula 14, in which he observed:

> "The law doth not allow of grants except there be a foundation of an interest in the grantor; for the law will not accept of grants of titles or of things in action which are imperfect interests; much less will it allow a man to grant or incumber that which is no interest at all, but merely future."

Consequently, a sale or a mortgage [7] of goods which the seller or borrower should thereafter acquire was void to pass a legal title, even though the goods were adequately described and easily ascertainable when they came into the seller's or borrower's ownership. The transaction might very well constitute a contract by the seller or borrower to transfer a legal title when he did acquire ownership, but the common law courts could not specifically enforce the contract, and so it created no obligation which attached to the goods and which might be enforced against other persons, such as judgment creditors of the seller or borrower, or his assignees in bankruptcy. A sale or mortgage of future goods was not wholly ineffective, however. The quotation from Bacon given above continued:

> "But of declarations precedent before any interest vested the law doth allow, but with this difference, so that there be some new act or conveyance to give life and vigour to the declaration precedent."

In other words, if the intention of the seller or borrower evinced by the original transaction was confirmed by a fresh transfer or mortgage after he acquired the goods, the buyer or lender would obtain a legal title thereby. The problem was whether any lesser "new act" would suffice. During the nineteenth century there were elaborated the circumstances when a "new act" by the seller of goods would appropriate them to the contract and pass the legal title to the buyer,[8] but no such rules were evolved in respect of mortgages. Consequently, the lender acquired no legal title unless the goods were transferred to him by a confirmatory deed executed after the borrower acquired them, or unless the goods were delivered to him,[9] or, possibly, unless the borrower attorned to him after acquiring the goods.[10] The lender might obtain delivery, however, by the original mortgage empowering him to seize the after-acquired goods,[11] and after some initial reluctance,[12] it was

[7] *Robinson* v. *Macdonnell* (1816) 5 M. & S. 228; *Lunn* v. *Thornton* (1845) 1 C.B. 379.
[8] See now Sale of Goods Act, 1893, s. 18, r. 5.
[9] *Lunn* v. *Thornton* (*supra*); *Hallas* v. *Robinson* (1885) 15 Q.B.D. 283.
[10] *Elmore* v. *Stone* (1809) 1 Taunt. 458; *Castle* v. *Sworder* (1861) 6 H. & N. 828; (both cases involved contracts for the sale, not the mortgage, of goods, but the principle seems to have been of general application).
[11] *Congreve* v. *Evetts* (1854) 10 Exch. 298.
[12] See *Lunn* v. *Thornton* (*supra*).

held that a mortgage of goods to be acquired by the borrower in the future impliedly authorised the lender to seize them so as to perfect his title.[13] But the licence to seize was useless unless it had been exercised before some third party, such as a purchaser or judgment creditor, had obtained the goods,[14] and so it really afforded the lender little security.

The other form of security, the pledge of goods, was no more helpful. Admittedly, a pledge did not involve the transfer of the legal title to the lender, and his powers of realisation were derived from the contract of loan and not from his being the owner of the goods, but it was held early on that a pledge was effective only when the goods were delivered to the lender,[15] so that it was impossible to pledge goods which the borrower did not yet own. Moreover, it was not possible to constitute a pledge by making merely a token delivery of goods to the lender and the lender allowing the borrower to retain possession of them for his own purposes subject to recall by the lender. A lender might redeliver the goods to the borrower so as to enable him to deal with them as the lender's agent and the pledge would not thereby be destroyed,[16] but a redelivery to the borrower for his own benefit terminated the bailment which was the foundation of the pledge, and so destroyed the lender's security.[17] Equally, it was not possible to pledge goods by delivering to the lender documents by which possession of them might be obtained, such as a warehouse keeper's warrant [18] or a railway delivery warrant,[19] for the common law did not equate possession of such documents with possession of the goods themselves. The only exceptions to this were if the document was a bill of lading,[20] or if the borrower was a mercantile agent within the Factors Acts [21] whether acting for a principal or on his own account,[22] but such exceptions did not help manufacturing companies which bought their raw materials from dealers in this country and did not import them themselves.[23]

13 *Hope* v. *Hayley* (1856) 5 E. & B. 830.

14 *Hallas* v. *Robinson* (*supra*).

15 *Ryall* v. *Rolle* (1749) 1 Atk. 165, *per* Burnet J. at p. 166. See also *Martin* v. *Reed* (1862) 11 C.B.(N.S.) 730.

16 *Reeves* v. *Capper* (1838) 5 Bing.N.C. 136; *North Western Bank* v. *Poynter, Son and Macdonald* [1895] A.C. 56.

17 *Tod and Son* v. *Merchant Bank* (1883) 10 R. (Ct. of Sess.) 1009, distinguished in *North Western Bank* v. *Poynter, Son and Macdonald* (*supra*) by Lord Herschell L.C. at pp. 71–72.

18 *William M'Ewan and Sons* v. *Smith* (1849) 2 H.L.C. 309.

19 *Official Assignee of Madras* v. *Mercantile Bank of India Ltd.* [1935] A.C. 53, 58–60.

20 *Sewell* v. *Burdick* (1884) 10 App.Cas. 74.

21 Factors Act, 1889, s. 3, re-enacting Factors Act, 1842, s. 4. Although expressed in general terms, the Factors Act, 1889, s. 3 applies only to pledges by mercantile agents (*Inglis* v. *Robertson* [1898] A.C. 616).

22 *Lloyds Bank Ltd.* v. *Bank of America National Trust and Savings Association* [1938] 2 K.B. 147.

23 There is a further exception in the Sale of Goods Act, 1893, s. 25 (2) (re-enacting the Factors Act Amendment Act, 1877, s. 4 and the Factors Act, 1889, s. 9), but these statutes lie outside the period of development of the common law under consideration here.

Roman law was far more flexible than English common law in respect of pledges, and was in consequence able to devise a form of security over after-acquired goods and also over things in action which in this country has only been achieved by the development of equitable principles. The original Roman *pignus* was the same as our pledge, involving the delivery of the pledged goods to the lender. But Roman law permitted the lender to redeliver the goods to the borrower who held them as a bailee at will of the lender, and the pledge remained intact notwithstanding. Under a later development of the *pignus*, the borrower never delivered possession of the goods to the lender at all, but merely gave him a contractual right to seize them on the borrower's default.[24] The lender retained his right to insist on delivery of possession of the goods, however, and because of this could recover them from anyone to whom the borrower delivered them, subject, of course, to the possessor's right to redeem the pledge. This developed form of security, the *hypotheca*, was free from the limitations of the pledge, and so could be used to give a security over property which could not be pledged, such as after-acquired goods,[25] or debts owed to the borrower,[26] and it was even possible to create a charge over a class of assets which was constantly changing, such as stock in trade of a business.[27] English law early rejected the *hypotheca*, however,[28] and it was only after many years of judicial opposition that equity was able to devise a similar form of security.

2. The Intervention of Equity

The first leading case [29] in which equity intervened to remedy the defects of the common law was one in which the mortgage created what was later identified as a floating charge, although it was too early at that date for the court to recognise it as such. A debtor assigned the machinery and implements at his mill to a trustee for his creditor subject to the usual proviso for redemption, and the deed of assignment provided that the trust thereby created should extend to all other machinery and implements which should be brought on to the mill in addition to or in substitution for the original items. The debtor retained possession of the mill and sold some of the original machinery and bought new machinery to replace it. A judgment creditor of the debtor seized some of the new machinery under a *fi. fa.*, and the question raised was whether the secured creditor, who had never taken possession of the new machinery, had a prior claim thereto. The House of Lords, reversing Lord Campbell L.C.,[30] held that he did have a prior claim.

[24] Gaius, *Institutes*, 8.64.
[25] *Digest*, 13.7.41.
[26] *Ibid.* 13.7.18 pr.
[27] *Ibid.* 20.1.34 pr.
[28] *Ryall* v. *Rolle* (*supra*).
[29] *Holroyd* v. *Marshall* (1862) 10 H.L.C. 191
[30] (1860) 2 De G.F. & J. 596.

Lord Westbury, who had succeeded Lord Campbell as Lord Chancellor, based his decision on the fact that the attempted mortgage of the after-acquired machinery operated as a contract to create a proper mortgage which equity would specifically enforce. He said [31]:

> " But if a vendor or mortgagor agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. . . . Apply these familiar principles to the present case; it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor (the debtor) was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question."

Lord Chelmsford went further. Rejecting Lord Campbell's ruling in the court below that an assignment or mortgage of after-acquired property is ineffective in equity as well as at law unless confirmed by some " new act," he said [32]:

> " The judgment of Lord Campbell resting, as he says, upon Lord Bacon's maxim, determines that some subsequent act is necessary to enable ' the equitable interest to prevail against a legal interest subsequently bona fide acquired.' It is agreed that this maxim relates only to the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) only by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law property, non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence, the agreement operates on it."

The difference between Lord Westbury's and Lord Chelmsford's reasoning is important. Lord Westbury conceived the mortgage of

[31] (1862) 10 H.L.C. 211.
[32] (1862) 10 H.L.C. 219–220.

after-acquired property as creating a contract for the creation of a proper mortgage which equity will specifically enforce when the property is acquired, and because of the availability of specific performance, the mortgagor becomes a trustee of the property for the mortgagee, and the mortgagee's proprietary rights thus obtained are binding on third persons. Lord Chelmsford, too, sees the original mortgage as a contract, but a contract which is self-executing as soon as the mortgagor acquires the property in question, so that whether the mortgagee could obtain an order of specific performance or not, he obtains equitable proprietary rights automatically.

Lord Chelmsford's view has on the whole prevailed in later cases. It was adopted in a later decision of the House of Lords [33] where a trader assigned by way of mortgage all book debts " due or owing or which may during the continuance of this security become owing " to him, and then later became bankrupt. The book debts in question became due before the bankruptcy and the mortgagee had in fact given notice of the mortgage to the debtors, but the majority of the members of the House of Lords held that the mortgagee's title prevailed over the claim of the trustee in bankruptcy simply on the ground that the equitable title to the debts passed to the mortgagee as soon as they became owing.[34] Lord Macnaghten, indeed, was at some pains to explain away Lord Westbury's judgment in the earlier case as supporting this view.[35] An early decision [36] cited by Lord Macnaghten [37] also lends support to Lord Chelmsford's reasoning. In that case a clergyman had purported to charge any benefice he should thereafter acquire with repayment of a loan. He later acquired a benefice, but before he executed a confirmatory mortgage of it, a statute was enacted prohibiting the giving of security over benefices in the future. Lord Cottenham L.C. held that the lender had a valid equitable charge over the benefice as soon as it was acquired, and he rejected the suggestion that the lender's rights depended on whether he could obtain specific performance of the clergyman's promise to execute a legal mortgage, a remedy which was now clearly unavailable because of the statutory prohibition. The only case which has cast doubt on Lord Chelmsford's view is a House of Lords decision on appeal from Scotland.[38] In that case a company which was indebted to its bank obtained the release of a collateral security over its goods by promising to procure a debenture from another company as substituted security. The debenture was issued to the first company, but it was wound up before the debenture was

[33] *Tailby* v. *Official Receiver* (1888) 13 App.Cas. 523.
[34] Lord Fitzgerald concurred on the ground that the mortgagee had perfected his title by giving notice of the mortgage to the debtors.
[35] (1888) 13 App.Cas. 547.
[36] *Metcalfe* v. *Archbishop of York* (1836) 1 My. & Cr. 547.
[37] (1888) 13 App.Cas. 549.
[38] *Bank of Scotland* v. *Macleod* [1914] A.C. 310.

transferred to the bank. It was held that the bank had no claim to the debenture. The judgments in the House of Lords relied heavily on the need to preserve equality between creditors of a company in liquidation, and neither of the two House of Lords decisions in the English cases dealt with above was cited. Lord Kinnear did, however, comment that a dictum by Lord Westbury in another Scottish case [39] that " an obligation to do an act with respect to property creates a trust," did not operate to perfect the bank's title in the present case,[40] and this, of course, amounts to a complete rejection of both Lord Westbury's and Lord Chelmsford's reasoning in *Holroyd* v. *Marshall*. It should be noted, however, that in the Scottish case, the company had not purported to mortgage the debenture to the bank, but had merely agreed to do so, and it may well be that Lord Chelmsford's view that an equitable interest passes immediately to the mortgagee on the acquisition of the property by the mortgagor applies only when the transaction is expressed in the form of a mortgage and not in the form of a contract to execute a mortgage.

The result of the equitable gloss on the effect of mortgages of after-acquired property is that until the mortgagor acquires the property the mortgagee has merely a personal contractual right against him, but when the property is acquired, an equitable proprietary interest immediately vests in the mortgagee, and the legal title, too, may be obtained by the mortgagor executing a supplemental mortgage, or, in the case of goods, by delivering them to the mortgagee.[41] The position of an equitable chargee of after-acquired property is precisely the same.[36] The protection afforded by equity is not complete, however, because the mortgagee's equitable proprietary interest may be overreached in favour of a subsequent purchaser or mortgagee of the legal title who has no notice of the equitable interest,[42] and because so long as the mortgagee's rights are purely contractual, they may be defeated by the mortgagor becoming bankrupt and obtaining his discharge in bankruptcy,[43] or by the mortgagor merely becoming bankrupt, for the mortgagee's contractual rights cannot ripen into an equitable

[39] *Fleeming* v. *Howden* (1868) L.R. 1 H.L.Sc. 372, 383.

[40] [1914] A.C. 323–325.

[41] The Bills of Sale Acts are disregarded in this article because they rarely affected companies carrying on commercial undertakings. Even before the Bills of Sale Act (1878) Amendment Act, 1882, s. 17 exempted debentures issued by incorporated companies, mortgages of goods by commercial concerns, whether incorporated or not, were usually exempted from the Acts under the provision of the Bills of Sale Act, 1854, s. 7 and the Bills of Sale Act, 1878, s. 4 which excluded from the definition of a bill of sale " transfers of goods in the ordinary course of business of any trade or calling."

[42] *Hallas* v. *Robinson* (1885) 15 Q.B.D. 288.

[43] *Collyer* v. *Isaacs* (1881) 19 Ch.D. 342 (a mortgagor of goods on certain premises and of " all other goods . . . . which may at any time hereafter be brought thereon " became bankrupt, and acquired further goods which he brought on to the premises after his discharge in bankruptcy; held, the mortgagee could not seize such goods as his contractual rights against the mortgagor ceased on his discharge in bankruptcy).

proprietary interest as against the mortgagor's trustee in bankruptcy after the bankruptcy has commenced.[44] These considerations are of no importance in connection with floating charges on a company's property, however, for notice of the charge can be given by registering it at the Companies Registry,[45] and it has been held that for reasons other than those applicable in a bankruptcy, a floating charge cannot attach to property which the company acquires after the commencement of its winding up.[46]

3. Mortgages under the Companies Clauses Consolidation Act, 1845

One of the less obvious factors in the development of the floating charge was the form of mortgage sanctioned by the Companies Clauses Consolidation Act, 1845, for use by companies incorporated by statute.[47] By such mortgages the company assigned to the mortgagee its " undertaking and all future calls on shareholders and all the tolls and sums of money arising by virtue of " its act of incorporation. The expression " undertaking " was unhelpfully defined as " the undertaking or works, of whatever nature, which shall by (the company's act of incorporation) be authorised to be executed," [48] and so it fell to the courts to decide to what property of the company the mortgage attached and what remedies a mortgagee had for the realisation of his security.[49]

Most statutory companies carried on public utility undertakings which the court was unwilling to allow mortgagees to break up by selling their assets piecemeal, and this reluctance undoubtedly coloured the interpretation which the court gave to the mortgagee's security. Thus, in one such action where the mortgagees applied for the appointment of a receiver with power to break up and sell a railway company's undertaking, Cairns L.J. rejected the application partly on the grounds of public policy, and partly because the mortgages of the company's undertaking created a charge on it as an integrated whole and as a going concern. He said [50]:

> " Whatever may be the liability to which any of the property or effects connected with it (the company) may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these

[44] *Re Jones, ex p. Nichols* (1883) 23 Ch.D. 782 (a mortgagor of debts to accrue in the future under a certain arrangement with a third party became bankrupt; the mortgagee was held not to be entitled to the debts which became owing after the bankruptcy began).

[45] *Wilson* v. *Kelland* [1910] 2 Ch. 306.

[46] *Re Yagerphone Ltd.* [1935] Ch. 392. The floating charge becomes a specific charge on the assets owned by the company at the commencement of the winding up, and so cannot extend to assets acquired by it thereafter.

[47] Companies Clauses Consolidation Act, 1845, Sched. C.

[48] *Ibid.* s. 2.

[49] The Act of 1845 enabled mortgagees to apply to the magistrates for the appointment of a receiver of the company's tolls and other money charged by the mortgages (ss. 53 and 54), but this remedy was little used.

[50] *Gardner* v. *London, Chatham and Dover Ry.* (1867) 2 Ch.App. 201, 217.

> contracts of mortgage are concerned, is, in my opinion, made over as a thing complete or to be completed; as a going concern, with internal and Parliamentary powers of management not to be interfered with; as a fruit bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*—that is to say the earnings of the undertaking—must be available to satisfy the mortgage; but in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees—by seizing or calling on this court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking—either prevent its completion, or reduce it into its original elements when it has been completed."

While the company's concern was a going concern, then, the mortgagee's rights were purely negative, namely, to prevent the company from distributing its income to its shareholders without first paying the interest due to the mortgagees and making provision for the repayment of the capital of their loans. But the mortgagees nevertheless had a charge on and a proprietary interest in the assets of the company. Consequently, they could restrain a judgment creditor of the company from levying execution on its property so as to defeat their security,[51] and when the company sold its undertaking [52] or was wound up [53] so that it ceased to be a going concern, the mortgagees were entitled to repayment of their loans out of the proceeds of sale of its assets in priority to its other creditors. The inability of the mortgagees to have the company's assets sold while it was a going concern was really only a restriction on their power to realise their security, and not a limitation on the extent of their security, despite the impression which the words of Cairns L.J. quoted above and other *obiter dicta* [54] might create. But the importance of the court's decisions on the effect of these mortgages was that the mortgagee was put in substantially the same position as the modern debenture holder secured by a floating charge, and it is therefore not surprising that when companies incorporated under the Companies Acts sought to give subscribers of loan capital a security which would not interfere with the carrying on of the company's business as a going concern, they consciously adopted the form of mortgage already in use by statutory companies.[55]

[51] *Furness* v. *Caterham Ry.* (1859) 27 Beav. 358; *Legg* v. *Mathieson* (1860) 2 Giff. 71.

[52] *Furness* v. *Caterham Ry.* (*supra*).

[53] *Re Glyn Valley Tramway Co.* [1937] Ch. 465

[54] *Hart* v. *Eastern Union Ry.* (1852) 7 Exch. 246, 265; affirmed (1852) 8 Exch. 116.

[55] The debenture in the first case in which the floating charge was recognised, *Re Panama, New Zealand and Australian Royal Mail Co.* (1870) 5 Ch.App. 318, was in the form of a mortgage under the Act of 1845 although the company was incorporated under the Companies Act, 1862.

This is not to say that in defining the rights of mortgagees of statutory companies the court was already recognising the floating charge, however. Thus, Cairns L.J. in the case cited above held that the mortgagees' security did not extend to the proceeds of calls made on shareholders after the issue of the mortgages nor to property bought therewith unless the mortgages expressly charged uncalled capital.[56] Again, in an action by unsecured bondholders of a statutory company who asserted that the Companies Clauses Consolidation Act, 1845, entitled them to the appointment of a receiver with power to realise the assets of the company in order to repay their loans, Lord Truro L.C., rejecting the contention, observed [57]:

> "It is, however, said . . . that effect may be given to the plaintiff's construction of the Act, by allowing the bond creditors or the mortgage creditors at any particular moment to assert their right, and that their right may be inchoate or in suspense until they have asserted it. But what a fraud it would be upon the general creditors to allow the company to contract largely upon the possession and apparent ownership of property, and then to give to the mortgage or bond creditors the opportunity of asserting their lien when probably the general creditors had allowed the company to obtain on credit the largest portion of their stock. Such a right is not consistent with the general administration of justice, and with the safety and convenience of a commercial concern, which this to a great extent is."

Similar sentiments have been expressed since the floating charge became a recognised part of our legal system,[58] but the importance of such sentiments when expressed in 1850 is that they indicate that the court was not yet deliberately moving toward a full recognition of floating securities.

4. Contractual Provisions Limiting the Liability of Shareholders

An even more problematical influence on the development of the floating charge was the provision inserted in companies' contracts with the object of limiting the liability of their members for breach of contract to the assets which the companies owned. In the absence of such a provision the members of unincorporated companies and of companies incorporated under the Joint Stock Companies Act of 1844 [59] were personally liable for their companies' debts and breaches of contract. With the advent of general limited liability [60] such contractual provisions became unnecessary and

[56] *Gardner* v. *London, Chatham and Dover Ry.* (1867) 2 Ch.App. 201, 215.
[57] *Russell* v. *East Anglian Ry.* (1850) 3 Mac. & G. 104, 144.
[58] By Buckley J. in *Re Alfred Melson and Co.* [1906] 1 Ch. 841, 844–846, and in *Re Crigglestone Coal Co.* [1906] 2 Ch. 327, 330.
[59] 7 & 8 Vict. c. 110.
[60] By the Limited Liability Act, 1855, a company incorporated under the Act of 1844 could limit the liability of its members to the capital unpaid on their

disappeared, and although they undoubtedly had some influence on the form of the floating charge, it is impossible to assess accurately from the few cases decided during the time they were in use what influence they had in inducing the court to recognise the floating charge as an effectual security.

The contractual provision limiting members' liability was extensively used by insurance companies, and usually took the following form [61]:

> " The capital stock of £ . . . and other the stock, securities, funds and property of the company remaining at the time of any claim or demand made, unapplied and undisposed of and inapplicable to prior claims and demands shall alone be liable " to meet claims on the policy, and no member shall be personally liable " beyond the amount unpaid on his shares . . . nor longer than he shall retain the said shares."

In their anxiety to protect their shareholders, the draftsmen of such clauses overlooked the difficulties to which they gave rise in adjusting the rights of policyholders whose claims accrued on different dates. The clause was effective in that the policyholder could sue the company in debt only for the lesser of the amount for which he had insured and the value of the company's assets at the date he demanded payment,[62] but where one policyholder had made such a demand, the claim of another policyholder who made his demand later was further limited to the value of the company's assets at the time less the amount payable under the first policy.[63] In other words, the issue of policies in this form gave rise to claims for amounts which depended on the dates and order in which they accrued, and although it was never expressly decided, it seems most likely that in a liquidation the several policyholders would also rank for payment in the order in which their claims accrued.[64] Indeed, the court seems to have had this idea in mind when it held that the policyholder acquired a charge on the company's assets at the date his claim accrued,[65] for if there were a succession of such charges, the claimants would rank for payment in that order.

shares by adopting the word " limited " as the last word of its name and complying with certain other conditions. The Acts of 1844 and 1855 were replaced almost immediately by the Joint Stock Companies Act, 1856, the first " modern " Companies Act.

61 See *Re Athenaeum Life Assurance Society, ex p. Durham* (1858) 4 K. & J. 517.

62 *Dawson* v. *Wrench* (1849) 3 Exch. 359

63 *Hallett* v. *Dowdall* (1852) 18 Q.B. 2, *per* Talfourd J. at p. 62. This case was an action by a policyholder against a shareholder whose shares were only partly paid, but the same reasoning would have applied in an action against the company. Talfourd J.'s reasoning was accepted by Martin and Parke BB., Williams and Cresweli JJ., concurred in Talfourd J's conclusions, and Platt and Alderson BB. dissented.

64 The alternative possibility, of course, was that although the dates and order of the claims determined their respective amounts, in a liquidation they might all rank *pari passu* for payment out of the company's assets.

65 *Law* v. *London Indisputable Life Policy Co.* (1855) 1 K. & J. 223; *Robson* v. *M'Creight* (1858) 25 Beav. 272.

Admittedly, in one case [66] Turner L.J. rejected the idea that policyholders acquired a charge on the company's assets and held that the provision in the policy merely determined the amount for which the policyholder could sue, but it is interesting to note that his reason for rejecting the concept of a charge was that if such charges attached to the company's business, its undertaking would be paralysed, an outlook which clearly did not envisage the possibility of a floating charge.

The significance of these cases in connection with the development of the floating charge is that, like the cases on the effect of mortgages under the Companies Clauses Consolidation Act, 1845, they illustrate the possibility of a company giving a general charge over its undertaking or assets which shall not be enforceable until some future time and which leaves the company free in the meantime to manage its business and deal with its assets as it wishes. It is also significant that when the floating charge was finally established, a form of words similar to that in the provision inserted in policies was held to create a floating charge.[67]

5. The Consummation

After the decision of the House of Lords in *Holroyd* v. *Marshall* [68] in 1862, the creation of a floating charge on the assets for the time being of a company became a possibility, and the decisions of the court on the effect of mortgages of the undertakings of statutory companies and of clauses in insurance policies making the company's assets solely answerable for claims thereunder, pointed the way for the realisation of this possibility. Business men and draftsmen must have apprehended the possibility promptly because mortgages and bonds began to appear during the 1860s which were secured by what we now recognise as floating charges. But judicial recognition was slow. Thus, when a company issued debentures in 1859 charging " all the lands, tenements and estate of the company and all their undertaking," it was held in 1864 that the charge attached only to the fixed assets of the company at the date the debentures were issued, and did not extend to calls made on shareholders thereafter nor to trade debts becoming due to the company thereafter.[69] Likewise, in 1864 it was held that directors who were empowered by the company's deed of settlement to mortgage its " funds or property " could not mortgage its uncalled capital because the proceeds of calls made after the creation of the mortgages were not the property of the company at that date.[70]

[66] *Re State Fire Insurance Co.* (1863) 1 De G.J. & S. 634, 640.
[67] *Re Florence Land and Public Works Co., ex p. Moor* (1878) 10 Ch.D. 530; *Re Colonial Trusts Corporation, ex p. Bradshaw* (1879) 15 Ch.D. 465.
[68] (1862) 10 H.L.C. 191.
[69] *King* v. *Marshall* (1864) 33 Beav. 565.
[70] *Re British Provident Life and Fire Assurance Society, Stanley's Case* (1864) 4 De G.J. & S. 407, *per* Turner L.J. at p. 414. A further reason given by his lordship was that a mortgage of uncalled capital would be destructive of

Again, where a company issued debentures in 1865 whereby it charged the " property belonging to us for the time being during the subsistence of this debenture with all the buildings on and stock on and connected with our said property and all the receipts and revenue to arise therefrom," it was held in 1867 that the debenture holders obtained a specific mortgage on each item of property the company acquired as it acquired it, and the company could only deal with such property with the consent of the debenture holders.[71] And in another case [72] where a company issued debentures in 1865 by which it assigned its " undertaking and real and personal estate " to the debenture holders, it was held in 1868 that they acquired a charge on the assets owned by the company at the date the debentures were issued, but not on assets subsequently acquired.

But in 1870 the break with the former decisions came. A company had issued debentures in 1866 charging its " undertaking " with payment of the debenture debt. The Court of Appeal in Chancery held [73] that when the company was subsequently wound up, the charge became a specific charge on the assets which it then owned, and so the debenture holders ranked for payment before the general creditors. Giffard L.J. added, and here was the crux of the departure from the former decisions [74]:

> " I take the object and meaning of the debenture to be this, that the word ' undertaking ' necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had arrived for the payment of his principal, and the principal was unpaid. I think the meaning and object of the security was this, that the company might go on during that interval, and furthermore, that during the interval the debenture holder would not be entitled to an account of mesne profits, or of any dealing with the property of the company in the ordinary course of carrying on their business. I do not refer to such things as sales or mortgages of property, but to the ordinary application of funds which came to the hands of the company in the usual course of business."

In 1878 and 1879 the Court of Appeal affirmed the decision of 1870, and held that debentures by which the company bound itself and

the directors' discretion to make calls when they thought necessary for the company's benefit. Curiously enough, this decision has survived the recognition of the floating charge, and it is still necessary for the company to have an express power to mortgage uncalled capital by its memorandum of association (*Newton* v. *Debenture Holders of Anglo-Australian Investment Co.* [1895] A.C. 244), and for the debenture to charge such uncalled capital expressly (*Re Streatham and General Estates Co.* [1897] 1 Ch. 15) for a valid charge to be created thereon.

71 *Re Marine Mansions Co.* (1867) L.R. 4 Eq. 601.

72 *Re New Clydach Sheet and Bar Iron Co.* (1868) L.R. 6 Eq. 514.

73 *Re Panama, New Zealand and Australian Royal Mail Co.* (1870) 5 Ch.App. 318.

74 *Ibid.* at p. 322.

" all (its) estate, property and effects," [75] or its " real and personal estate," [76] entitled the debenture holders to a specific charge on the assets of the company which it owned at the commencement of its winding up. In the former of these two cases Jessel M.R. reasoned that the charge created by the debentures could not be a specific charge on the company's assets while it was a going concern, but must be a charge which becomes enforceable only when the company is wound up or when the debenture holders obtain the appointment of a receiver by the court. He said [77]:

> " Here again I think when you look at the nature of the company, the duties the directors had to perform, and the terms in which the articles of association are couched, you may fairly arrive at the conclusion that it means this kind of security—that the bond or debenture shall be a security on the property of the company as a going concern, subject to the power of the directors to dispose of the property of the company while carrying on its business in the usual course. . . . It is therefore inconsistent to suppose that the moment you executed a bond or debenture you paralysed the company and prevented it carrying on its business, for if you read the words to mean a specific charge on the property of the company, then . . . (although) the company is formed to build and to let and mortgage its property, you can neither lease nor mortgage without the assent of every individual bond or debenture holder. . . ."

In the case of 1870 [73] the court had reserved the question whether a company which had created a floating charge could create a later specific mortgage of part of its property which would rank before the floating charge. In two later cases [78] it was held that if the company has power to borrow on the security of a specific mortgage,[79] the creation of the mortgage is merely an exercise of its powers to which the floating charge is subject, and so when the company is wound up or the debenture holders obtain the appointment of a receiver, the specific mortgage ranks for payment out of the property over which it was given before the floating charge.

6. The Theories

It was inevitable that in the early cases the court should conceive the floating charge to be one which attached to the property of the company for the time being, but which could not be realised until the company was wound up or the court saw fit to appoint a

[75] *Re Florence Land and Public Works Co., ex p. Moor* (1878) 10 Ch.D. 530.
[76] *Re Colonial Trusts Corporation, ex p. Bradshaw* (1879) 15 Ch.D. 465.
[77] (1878) 10 Ch.D. 540–541.
[78] *Moor* v. *Anglo-Italian Bank* (1878) 10 Ch.D. 681; *Re Hamilton's Windsor Ironworks Co., ex p. Pitman and Edwards* (1879) 12 Ch.D. 707.
[79] Trading companies have power to borrow on the security of their property by implication of law (*Re International Life Assurance Society, Gibbs and West's Case* (1870) L.R. 10 Eq. 312; *General Estate and Monetary Co.* v. *Smith* [1891] 3 Ch. 432).

receiver.[80] Every new item of property which the company acquired became subject to the charge, but ceased to be subject to it when the company disposed of it. Thus, by a complicated process of addition and subtraction it was possible to arrive at the assets of the company at the date when the charge crystallised and became enforceable. It was an easy transition from this conception of the floating charge for the court to envisage the company's right to manage its affairs and dispose of its property until crystallisation as a licence given to it by the debenture holders. This idea may have originated from the passage in Jessel M.R.'s judgment quoted above,[77] but it received a more concrete expression in later cases.[81] On the other hand, three cases at least have rejected the idea of a licence,[82] and have explained the nature of the floating charge in words such as those of Buckley L.J.[83]:

> "A floating charge is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security."

The difference of judicial opinion as to whether there is an implied licence given to the company is not a merely metaphysical one. It can result in different answers to problems concerning the rights of debenture holders. For example, if it is accepted that there is an implied licence, it must be subject to some limits, so that if the company proposes to dispose of its assets *ultra vires* [84] or so as to destroy the debenture holders' security,[85] the licence will be exceeded and the debenture holders may obtain an injunction to restrain the disposition. On the other hand, if Buckley L.J.'s opinion quoted above is correct, the debenture holders may intervene only when they have obtained a specific charge on the company's assets, and so their only remedy is to seek the appointment of a receiver by the court, whereupon their floating charge will crystallise. Again, if the theory of an implied licence is accepted, the licence will terminate on the company being wound up, and even though the debentures provide that the debenture debt shall not become due nor the security become enforceable if

[80] For the occasions when a receiver will be appointed, see Halsbury's *Laws of England* (3rd ed.), vol. 6, p. 508, and Pennington's *Principles of Company Law*, pp. 327–329.

[81] *Davey and Co.* v. *Williamson and Sons Ltd.* [1898] 2 Q.B. 194, *per* Lord Russell C.J. at p. 200; *Re Borax Co., Foster* v. *Borax Co.* [1899] 2 Ch. 130; *Re Crompton and Co. Ltd., Player* v. *Crompton and Co. Ltd.* [1914] 1 Ch. 954, *per* Warrington J. at p. 964.

[82] *Biggerstaff* v. *Rowatt's Wharf Ltd.* [1896] 2 Ch. 93, *per* Kay L.J. at p. 105; *Edward Nelson and Co.* v. *Faber and Co.* [1903] 2 K.B. 607; *Evans* v. *Rival Granite Quarries Ltd.* [1910] 2 K.B. 979.

[83] *Evans* v. *Rival Granite Quarries Ltd.* (*supra*) at p. 999.

[84] *Re Borax Co., Foster* v. *Borax Co.* (*supra*).

[85] *Hubbuck* v. *Helms* (1887) 56 L.J.Ch. 536.

the winding up is merely for the purpose of amalgamation or reconstruction, the court will appoint a receiver in that event.[86] On the other hand, if the concept of the licence is rejected, the court may allow the parties to make their own bargain about the events which shall cause the floating charge to crystallise and become enforceable.[87] Finally, if the theory of an implied licence is accepted, the licence cannot extend to dispositions of the company's assets except in the ordinary course of its business, and since seizures of its assets by its judgment creditors cannot be of that nature, judgment creditors' claims must always be deferred to those of the debenture holders.[88] On the other hand, if there is no implied licence, judgment creditors who have completed their executions before the floating charge crystallises will have priority for payment out of the proceeds of the property they have seized simply because at the date of the executions the debenture holders could not have interfered to prevent them.[89]

The licence theory introduces an unnecessary complication into the law relating to floating charges, and is best rejected. If Buckley L.J.'s opinion quoted above is correct, it seems that the floating charge today occupies a position midway between the traditional mortgage and the Roman *hypotheca*. Unlike the traditional mortgage, it is not a specific charge on the assets of the company at the date of its creation and on the assets later added thereto, subject to a licence of somewhat indeterminate extent for the company to dispose of such assets. On the other hand, unlike the Roman *hypotheca*, a floating charge does not merely create a right to take possession of assets which are ascertained on the occurrence of a specified future event. In practice, however, the difference between the floating charge and the *hypotheca* are minute, and probably amount to no more than that a debenture holder secured by a floating charge has an immediate proprietary interest in the property owned by the company from time to time,[90] whereas the rights of a lender secured by an *hypotheca* are basically contractual, and although he may recover possession of the property subject to the *hypotheca*, he will acquire a proprietary interest therein only by foreclosing.

Robert R. Pennington.*

[86] *Re Crompton and Co. Ltd., Player* v. *Crompton and Co. Ltd.* (*supra*).
[87] *Davey and Co.* v. *Williamson and Sons Ltd.* (*supra*) as explained by Buckley L.J. in *Evans* v. *Rival Granite Quarries Ltd.* (*supra*) at p. 1000.
[88] *Davey and Co.* v. *Williamson and Sons Ltd.* (*supra*).
[89] See *Re Opera Ltd.* [1891] 3 Ch. 260; *Norton* v. *Yates* [1906] 2 K.B. 746.
[90] Thus, a contract for the creation or transfer of a floating charge over land must be evidenced by a written memorandum signed by the party to be charged in order to satisfy the Law of Property Act, 1925, s. 40 (*Driver* v. *Broad* [1893] 1 Q.B. 539).

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THE SOVEREIGNTY OF THE IMPERIAL PARLIAMENT

Ever since 1931 it has been a matter of doubt whether section 4 of the Statute of Westminster [1] has had the effect of binding the Imperial Parliament to legislate in a particular manner if such legislation is to take effect as part of the law of a dominion, or whether the section does not bind Parliament but merely represents a solemn way of declaring a constitutional convention. If the former view is accepted, the traditional theory of parliamentary sovereignty has to be substantially modified; it is clearly incompatible with parliamentary sovereignty regarded as an absolute and unchanging *Grundnorm* of the British legal system and constitution (and of most of the Commonwealth legal systems and constitutions also). On this account, therefore, the general tendency of constitutional lawyers is to reject the interpretation of section 4 which requires Parliament as a matter of law to act in a particular way for any particular purpose.

Typical of the traditional approach is the famous passage from Viscount Sankey's advice in *British Coal Corporation* v. *R.*[2] where he says, "It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired; indeed the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute."

Leaving aside questions of constitutional convention or political expediency, this has been treated as infallible judicial support for the traditional theory of parliamentary sovereignty referred to above. Thus it is said that by virtue of its sovereignty the Imperial Parliament may, by ordinary process of legislation and without regard to the provisions of section 4 of the Statute of Westminster, 1931, legally repeal the Statute of Westminster; or that legislation clearly purporting to extend to a dominion would, in the eyes of English law, be treated as so extending, whether or not the recital prescribed by section 4 appeared therein; or that the enactment of legislation in disregard of section 4 would by implication repeal section 4.[3]

1 "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

2 [1935] A.C. 500, 520.

3 *Cf.* K. C. Wheare, *The Statute of Westminster and Dominion Status*, Chap. VI, 3; H. W. R. Wade, "The Basis of Legal Sovereignty" (1955) C.L.J. 172.

Such a viewpoint disregards the terms of section 4 of the Statute of Westminster, which refers to legislation of the Imperial Parliament extending to a dominion so as to form *part of the law of that dominion*. And unless the legislation in question is treated by the courts in the dominion concerned as part of its law it cannot be said to have extended to that dominion, whatever its effect in English municipal law may be.[4]

However, this question, along with the associated question of the effect of imperial legislation enacted before the passing of the Statute of Westminster, 1931, has recently been considered by the High Court of Australia in *Copyright Owners Reproduction Society* v. *E.M.I. (Australia) Pty., Ltd.*[5]

The point arose in the following way. The (Imperial) Copyright Act, 1911, was adopted as part of the law of Australia by section 8 of the (Australian) Copyright Act, 1912, which provided that " The British Copyright Act, a copy of which is set out in the Schedule to this Act, shall . . . be in force in the Commonwealth." This was later interpreted as meaning that the 1911 Act was in effect in Australia as an Imperial Act and not by virtue of the legislative power of the Commonwealth Parliament.[6] By section 19 (3) it was provided that royalties should be paid on gramophone records at the rate of 5 per cent. of their retail price; it was further provided that if it appeared to the Board of Trade that 5 per cent. was no longer equitable the Board might, after due inquiry, vary the rate of royalty, but that such variation should not take effect until confirmed by Parliament.

In 1928 such an inquiry took place, and the Board of Trade made an order increasing the royalties under section 19 (3) to $6\frac{1}{4}$ per cent.; this was later confirmed by the Imperial Parliament by the Copyright Order Confirmation (Mechanical Instruments: Royalties) Act, 1928.[7] This (being a Provisional Order confirmation) was a private Act of Parliament; it did not mention Australia, or indeed any other of the three self-governing dominions, twenty-five other British possessions and eighteen protectorates to which the 1911 Act then applied. It provided that the order of the Board of Trade was thereby confirmed " and all the provisions thereof shall have full validity and force." The contemporary opinion of Sir Robert Garran, then Solicitor-General of Australia, and of the Comptroller of the Industrial Property Department of the Board of Trade in England was that the 1928 Act did not apply to the self-governing dominions.[8]

[4] *English* municipal law is suggested, because there is no such thing as United Kingdom municipal law; but in fact there is no reason why legislation, intended to take effect in a dominion, but failing to do so, should have any effect in the United Kingdom at all.

[5] (1958) 32 A.L.J.R. 306.

[6] *The Gramophone Co., Ltd.* v. *Leo Feist, Ltd.* (1928) 41 C.L.R. 1.

[7] 18 & 19 Geo. 5, c. lii.

[8] See 32 A.L.J.R. at p. 308.

On June 1, 1957, the Copyright Act, 1911, was repealed, so far as it affected the United Kingdom, by section 50 and the Ninth Schedule to the (U.K.) Copyright Act, 1956. It had obviously occurred to the draftsman of the Bill that the 1911 Act was still in force elsewhere in the British Commonwealth and a clause was therefore included, as clause 41 of the Seventh Schedule, to the following effect:

> " In so far as the [1911] Act . . . forms part of the law of any country other than the United Kingdom at a time after that Act has been . . . repealed in the law of the United Kingdom, it shall, so long as it forms part of the law of that country, be construed and have effect as if that Act had not been so repealed."

This clause was not expressed to be enacted at the request and with the consent of the Parliament of the Commonwealth of Australia.

The present action had been brought for a declaration that the rate at which royalties were payable in respect of a gramophone record of a musical work, entitled " Springtime in Victoria," was $6\frac{1}{4}$ per cent. The following two questions were raised:

(1) What was the effect (if any) of the 1928 Act upon the law of Australia?

(2) What was the effect (if any) of clause 41 of the Seventh Schedule to the 1956 Act upon the law of Australia?

It will be seen that both questions bring in issue the power of the Imperial Parliament to legislate for the dominions, the first before, the second after, the Statute of Westminster, 1931.[9]

On the question of the applicability of the 1928 Act, the High Court held by a majority (Dixon C.J., McTiernan and Taylor JJ.; Menzies J., diss.) that the Act did not apply to Australia. Dixon C.J. and McTiernan J. (with whom Taylor J. agreed but without giving reasons) both conceded that the 1928 Act was a true legislative Act and not a mere confirmation of the Board of Trade,[10] but held that it was a strong convention that the concurrence of a dominion must be obtained before the Imperial Parliament legislated for it, even before 1931; this convention gave rise to a rule of construction that, in the absence of evidence of a dominion's concurrence, the Act of the Imperial Parliament was not intended to extend to such dominion. " The rule of construction that found its source in the political and constitutional relations between the United Kingdom and the Commonwealth of Australia before the Statute of Westminster would raise a presumption that the Act of 1928 was not intended to operate of its own force in this

[9] The Statute of Westminster, 1931, was adopted by the Commonwealth of Australia in 1942 (Act No. 56 of 1942), the adoption to date back to the commencement of the Statute in 1931.

[10] This was based partly on the emphatic words of the 1928 Act, and partly on the fact that it was arguable that the Board of Trade had exceeded the powers conferred by s. 19 (3) (proviso) of the 1911 Act.

country [*viz.*, Australia]. Needless to say, it is a rule of construction which this court would be expected to apply." [11] Dixon C.J. added that the Imperial Parliament could not be supposed to intend that, in exercising the procedure by way of Provisional Order following an inquiry in England, it was altering the law relative to the payment of royalties in Australia. This supposition was strengthened by the fact that the Act of 1911 had itself been brought into force in Australia by an Act of the Commonwealth Parliament.

Menzies J. dissented on the ground that, since the Act of 1911 had been brought into force by the (Australian) Copyright Act, 1912, s. 8, the Commonwealth Parliament had concurred in the grant of the powers, to alter the rates of royalty, contained in the proviso to section 19 (3) of the 1911 Act. He therefore took the view that the United Kingdom Parliament had, in passing the 1928 Act, validly exercised a power to alter Australian law, not by virtue of any sovereign authority, but as the authorised delegate of the Commonwealth Parliament.[12]

There remained the second question, namely, what was the effect of clause 41 in Schedule VII to the 1956 Act? Dixon C.J. (with whom Taylor and Menzies JJ. agreed, McTiernan J. expressing no opinion) held that in the absence of a declaration in the 1956 Act that the Commonwealth of Australia had requested or consented to its enactment, the repeal of the 1911 Act did not, because of section 4 of the Statute of Westminster, extend to Australia. He added that " in view of section 4 of the Statute of Westminster [clause 41 of the Seventh Schedule] does not operate in point of law in Australia, and what its operation in the United Kingdom can be in point of fact it is difficult to see." [13] In other words, the 1911 Act remains law in Australia, not because of the saving in clause 41 but simply because no competent authority has repealed it.

Accepting this decision, it is submitted that the following points have been established:

(1) Even before the Statute of Westminster, it was a legal rule of construction that legislation of the Imperial Parliament should not, in the absence of the concurrence of the dominions concerned, be presumed to extend as law to the self-governing dominions. It is to be noted that even Menzies J. did not regard the 1928 Act as affecting Australia by reason of any sovereign authority in the Imperial Parliament.

(2) Since the Statute has become part of the law in the

[11] *Per* McTiernan J., 32 A.L.J.R. at p. 310.

[12] *Per* Menzies J., 32 A.L.J.R. at p. 314. (*Cf.* the New Zealand Loans Act, 1932 (N.Z.), which in a similar way delegated a power of disallowance to the Sovereign acting on the advice of the Imperial Government.)

[13] *Per* Dixon C.J., 32 A.L.J.R. at p. 306.

dominions, it is a rule of law in those countries that purported legislation of the Imperial Parliament intended to apply to them must bear the specified earmark—a recital that the request and consent of the dominion has been obtained—otherwise that legislation will not take effect as law there. Clause 41 was clearly intended to apply to Australia, but, in the absence of the recital required by section 4 of the Statute of Westminster, it was a mere nullity. The fact that the result would have been the same, if clause 41 had been accepted as law, is irrelevant; it is clear that the law of Australia would remain unaffected whatever clause 41 said.

From these conclusions three further corollaries may be drawn by inference:

(3) The disregard by the Imperial Parliament of section 4 of the Statute of Westminster when enacting clause 41 of the Seventh Schedule to the 1956 Act has not, so far as Australia is concerned, resulted in the implied repeal of section 4. In fact, section 4 stands and the clause which failed to conform has been disregarded.

(4) Section 4 (or indeed any other part of the Statute of Westminster) can be repealed by an Act of the Imperial Parliament only if such Act complies with the formal requirements of section 4 itself.

This is because any legislation of the Imperial Parliament (whether affecting copyright or anything else) intended to take effect as law in a dominion must conform to the requirements of section 4. But the Statute of Westminster, 1931, is concerned exclusively with matters affecting the dominions and its repeal (if it is to be meaningful) must therefore extend to the dominions. Hence an Imperial Act, to effect such a repeal, must bear the declaration required by section 4.[14]

(5) Although the foregoing may represent primarily the reasoning of a court in the dominions, it is submitted that the same conclusion should be reached by a court sitting in the United Kingdom.

Legislation by the Imperial Parliament affecting the Statute of Westminster, 1931, must affect the law of the dominions concerned. But the law of (say) Australia does not differ according to whether it is considered in an Australian or an English court; Australian law is that which the Australian court would apply (regardless of whether the legislature is at Westminster or Canberra) and the English court applying Australian law must follow suit. Hence, if

[14] *Cf.* the present writer's "The Sovereignty of Parliament Today" (1953) 10 *University of Toronto L.J.* 54, 70, where this proposition is discussed in the general context of parliamentary sovereignty.

it be the law of Australia that purported legislation intended to affect Australian law is of no effect because of its failure to conform with section 4 of the Statute of Westminster, then this also is the rule to be applied in the United Kingdom.

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GENERAL PRACTICE IN INDUSTRY

In actions brought by employees for negligent failure to provide a safe system of work, employers frequently introduce evidence that theirs was a system which customarily prevailed in that particular industry. The issues of the admissibility, relevance and effect of such evidence which then arise have produced different answers in the cases which have dealt with them, but clarification has recently been provided by the House of Lords in *Cavanagh* v. *Ulster Weaving Co., Ltd.*[1] The aim of this paper is to deal with these issues.

The Dunedin Formula

One of the early cases to raise such issues was *Morton* v. *William Dixon Ltd.*[2] A miner sued his employers alleging negligence in failing to take precautions against the fall of coal from the top of the shaft into the space between the side of the shaft and the edge of the cage. Lord President Dunedin said:

> " Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault or omission should be one of two kinds, either to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it." [3]

This formula, although " stated with all the Lord President's trenchant lucidity," [4] has been the cause of much difficulty in subsequent cases. In the first place it revives nineteenth-century notions when it talks about " omissions," and necessitates the drawing of the difficult distinction between misfeasance and non-feasance. Secondly, by talking in terms of " folly " instead of " reasonable care," it tends to increase the plaintiff's burden in this type of case.

More Recent Cases

Paris v. *Stepney Borough Council* [5] has some relevance to the present discussion, since it was there argued by the employers that reasonable care, as reflected in customary practice, did not require the provision of goggles for workmen with normal sight, therefore they were not negligent in failing to provide goggles for a one-eyed

1 [1959] 3 W.L.R. 262.
2 1909 S.C. 807.
3 *Ibid.* 809.
4 *Per* Lord Normand, *Paris* v. *Stepney B.C.* [1951] A.C. 367, 382.
5 [1951] A.C. 367.

workman. There, however, the House of Lords was able to avoid the problem by pointing out that whether or not it was negligent to fail to provide goggles for normal workmen—as to which custom might have relevance—it was negligent to fail to make such provision for the one-eyed workman.[6]

In *Morris* v. *West Hartlepool Steam Navigation Co. Ltd.*,[7] the plaintiff, an inexperienced seaman, claimed damages for injuries he sustained in falling thirty or forty feet down an uncovered and unfenced 'tween deck hatch. The defence to this action was that, in doing as he did, the master was merely following the invariable practice adopted at sea within the experience of witnesses, which covered a period of some forty years, during which time no accident of this nature had occurred. Whether the practice was good or bad, it was argued, the defendants were entitled to rely upon it.

The House of Lords, by a three to two majority, decided in favour of the employee, reinstating the decision of the trial court. In doing so, they tended to favour the view that evidence of conformity to custom is admissible, although not conclusive, evidence of due care. But once again the case cannot be regarded as clear authority for this view. In order for custom to have any significance in this type of case, the circumstances in the places as to which evidence of such custom is given must be similar to those prevailing in the defendant's place of business. In this case, the House of Lords did not appear to be satisfied as to the similarity of circumstances—in the case of most ships, it seemed to be unusual to send men to the 'tween decks after cleaning and repairing was finished, and in any event the hatch covers would usually be replaced, whereas in this particular type of ship it was not practicable to replace the hatch covers because a " feeder " used for loading grain was placed across the hatch.[8] Although therefore they cannot be regarded as forming part of the *ratio decidendi*, there are some useful statements in the speeches on the question of the effect of evidence of practice. Lord Cohen expressed the view that

> " when the court finds a clearly established practice ' in like circumstances ' the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one." [9]

The Cavanagh Case

The question of the effect of evidence of practice " in like circumstances," which the courts had hitherto been able to avoid, was squarely raised in *Cavanagh* v. *Ulster Weaving Co. Ltd.*[10]

6 See especially the speech of Lord MacDermott, *ibid.* at pp. 390–391.
7 [1956] A.C. 552.
8 See *ibid.* at p. 574 (*per* Lord Reid); at p. 576 (*per* Lord Tucker); at p. 579 (*per* Lord Cohen).
9 *Ibid.* at p. 579.
10 [1959] 3 W.L.R. 262.

The plaintiff was working on the roof of his employer's factory, and it was his job to bring up buckets of cement, each weighing three stone. The roof consisted of a series of transverse ridges, each with one aspect slated and the other glazed. There was a gangway of planks laid across the transverse ridges. The plaintiff moved along this gangway until he came to a particular ridge, then proceeded to move down the slated aspect to the gutter between that ridge and the next, by means of a roof ladder placed there for the purpose. This ladder, about 11 feet long, lay flat against the slated aspect, which was 9 feet 6 inches in length, with one end in the gutter and the other projecting a foot or so beyond the ridge tiles. In view of the thickness of the ladder and rungs, the upper surface of each rung was about 2 inches from the slates. The slope of the slated aspect, and therefore of the roof ladder, was one of 37 degrees to the horizontal. As he was carrying a three-stone cement bucket, and had only one free hand, it was the habit of the plaintiff to descend the roof ladder facing the glazed aspect of the next ridge and with his back to the slates on which the ladder was placed.

In the morning of the day of the accident, the plaintiff had been wearing shoes, but it became wet in the gutters and the foreman had given him a pair of rubber boots to wear instead. These he had on when injured. On getting to the roof ladder the plaintiff left his bucket down on the plank gangway and stepped on to the second or third rung of the ladder. Then he turned and picked up the bucket, whereupon his feet slipped from under him, and he went cascading down the ladder to the glazed aspect of the next ridge, breaking the glass and sustaining serious injuries.

The plaintiff alleged negligence—giving evidence as to the desirability of a handrail—and breach of statutory duty against the defendants. In framing the former allegation, with which we are concerned, the plaintiff did not allege that the defendants were negligent in that the system adopted by them was contrary to the general practice of the trade. At the trial, however, the defendants called as an expert a civil engineer who was asked the question: " How far does this set-up accord with good practice? " He answered: " For this type of access to building work I would say that it is perfectly in accord with good practice. I have very considerable experience of such work on roofs for over twenty years." Nevertheless the trial judge left detailed issues to the jury, which found in favour of the plaintiff.

The central issue with which this paper is concerned was neatly raised in that the Court of Appeal in Northern Ireland had accorded conclusive effect to the evidence of practice, in allowing the defendant's appeal and setting aside the jury's verdict. Accepting the Dunedin formula, Curran L.J. thought the evidence of conformity to practice was " clearly relevant and once it is established it is my opinion that a finding by the jury that it was

folly in the defendants to neglect to provide something else cannot be justified." [11]

The House of Lords reversed the intermediate court, holding that the trial judge had properly left the issue to the jury, since evidence of conformity to custom is not conclusive of due care. As Viscount Simonds put it, "the error of the majority of the [Court of Appeal] lay in treating as conclusive evidence which is not conclusive, however great its weight. . . ." [12] Lord Tucker, after expressing his agreement with the proposition stated by Lord Cohen in *Morris's* case,[13] also held that the jury's verdict should not have been disturbed.

The case also contains some interesting and useful passages discussing the Dunedin formula. Lord Normand in *Paris* v. *Stepney B.C.*[14] had said that the formula "does not detract from the test of the conduct and judgment of the reasonable and prudent man." Further support was given to this view in the speeches of Lords Keith and Somervell. In the view of the former, "The ruling principle is that an employer is bound to take reasonable care for the safety of his workmen and all other rules or formulas must be taken subject to this principle." [15]

The latter passage is typical of much of the discussion in the *Cavanagh* case. In emphasising the inconclusive effect of evidence of conformity to practice, the House of Lords seems to have gone to the opposite extreme of minimising the importance of evidence of

[11] Quoted in Lord Tucker's speech, *ibid.* at p. 270.
[12] *Ibid.* at p. 267.
[13] *Supra*, note 9.
[14] [1951] A.C. 367 at p. 382.
[15] [1959] 3 W.L.R. 262 at p. 273; *cf. ibid.* at p. 274, *per* Lord Somervell. Several members of the House criticised the use of the words "omission" ("In the sphere of negligence, in the relationship of master and servant, I find the borderline between acts of omission and acts of commission very fine . . . ," *ibid.* at pp. 272–273, *per* Lord Keith) and "folly" ("In any case the formula seems to suggest, though this cannot have been intended, that if a plaintiff calls no evidence of practice he must establish folly in order to make out a prima facie case. In my view it would be unfortunate if courts had to consider what amounted to folly . . . ," *ibid.* at p. 274, *per* Lord Somervell. *Cf. ibid.* 273, *per* Lord Keith; *ibid.* 270, *per* Lord Tucker, and *cf.* Lord Cohen's opposition of "folly" and "reasonable and prudent" in *Morris's Case* [1956] A.C. 552, 579). With this criticism of the word "folly" and the formula generally, compare the stronger language of the Australian High Court in *Hamilton* v. *Nuroof (W.A.) Pty., Ltd.* (1956) 96 C.L.R. 18, 26: "Trenchantly lucid and very useful as Lord Dunedin's emphatic warning may be it is not the language of the common law, which does not speak of 'folly,' but of a failure in reasonable care for the safety of the workman and does not attempt in advance to reduce possible situations 'absolutely' to two categories" (*per* Dixon C.J. and Kitto J.). And *cf.* the earlier antipodean criticism in *Donohue* v. *Union S.S. Co. of New Zealand, Ltd.* [1951] N.Z.L.R. 862, 879: "An ordinarily prudent employer does not provide only against obvious dangers. If he is an employer . . . it is his duty to take thought for the safety of his workmen, and take such precautions as reasonable consideration of the probable dangers would suggest. It is not only the obvious he has to guard against, nor has it been generally stated that he is to be judged by the standard of what it would be foolish not to do. In my view the word 'foolish' understates his duty" (*per* Fair A.C.J., dissenting).

custom. Such passages savour of the argument that since evidence of practice only leads to an inquiry as to the reasonableness of the practice, which is tested by the same standard of the reasonable man as are cases where no such evidence is introduced, this type of evidence is completely redundant.[16] They therefore form a convenient point of departure into a discussion of the usefulness and relevance of evidence of practice.

Relevance of Evidence of Conformity to Practice

Ever since *Vaughan* v. *Menlove*,[17] it has been clear that English law takes an objective approach to the question of reasonable care. One who is involved in an automobile accident cannot effectively assert that his reaction time is below average. At least in relation to conduct and abilities required by law in carrying out day-to-day tasks, reasonable care is equivalent to average care. This has led some to think that evidence of custom should be conclusive in favour of the defendant, since it shows that he took " average care " in relation to the practice in question.[18] But in these cases we are not concerned with current activities and the failure of an individual to measure up to average abilities in performance, so much as with the failure to introduce a precaution which would render safer a whole series of activities involved in an industry. In competitive industrial situations, where the employer is tempted to cut costs, we cannot allow industry to set its own standards. To give conclusive effect to conformity evidence would have this effect. Yet such evidence does have practical significance; it is not completely redundant.

Professor Clarence Morris suggests that conformity evidence has a threefold relevancy.[19]

In the first place, such evidence shows the impact on the industry which a decision in favour of the plaintiff will have. It is true that " neglect of duty does not cease by repetition to be neglect of duty," [20] and that it is possible for the whole industry to be negligent, but when sympathetic juries tend to favour plaintiffs at the expense of wider issues, it is also right that they should be reminded that these are in the nature of test cases, and that the imposition of liability on the defendants will require the whole industry to revise their system. This thought seems to have

16 *Cf.* Morris, " Custom and Negligence " (1942) 42 Col.L.R. 1147, 1155.

17 (1837) 3 Bing.N.C. 468.

18 *e.g.*, *Wright* v. *Cheshire C.C.* [1952] 2 All E.R. 789 at p. 792 (*per* Singleton L.J.) and *ibid.* at p. 795 (*per* Birkett L.J.). *Cf.* the attitude of the Court of Appeal in Northern Ireland in the *Cavanagh* case, and that of Lord Morton of Henryton, as reflected in his dissenting speeches, particularly in *Paris* v. *Stepney B.C.* [1951] A.C. 367 at p. 387.

19 See his " Custom and Negligence " (1942) 42 Col.L.R. 1147.

20 As Lord Tomlin happily put it in another context; see *Bank of Montreal* v. *Dominion Guarantee Co.* [1930] A.C. 659, 666.

affected much of the judicial discussion of the importance of conformity evidence, and there are cases where it has been the subject of express emphasis. Lord Reid has said, for example:

> "A plaintiff who seeks to have condemned as unsafe a system of work which has been generally used for a long time in an important trade undertakes a heavy onus: if he is right it means that all, or practically all, the numerous employers in the trade have been habitually neglecting their duty to their men. . ." [21]

Secondly, one of the various factors which determine the measure of care required by the law [22] is that of the feasibility of alternative conduct. Where technical crafts are concerned, the fact that the defendant's colleagues have failed to devise or implement a safer system may suggest that alleged precautions are impracticable, and prevent the jury from lightly finding that the defendant should have taken greater care. This explains why in all of these cases the courts have been careful to advert to the feasibility of greater caution.

In *Paris* v. *Stepney B.C.*,[23] Lord Oaksey observed that it was "a simple and inexpensive precaution to take to supply goggles. . . ."

In *General Cleaning Contractors Ltd.* v. *Christmas*,[24] after concluding that the defendants had not been proved to be negligent in failing to provide ladders or safety belts for their employees, Lord Tucker dealt with the question of feasible precautions:

> "My Lords, I have felt considerable doubt on this matter. It is true that in some cases there may be precautions which are so obvious that no evidence is required on the subject, but in a case like the present it is eminently desirable before condemning a system in general use that it should be clearly established by evidence that some other and safer system is reasonably practicable and that its adoption would have obviated the particular accident which has occasioned damage to the plaintiff. The provision of a block or wedge for insertion in defective windows would not, on the plaintiff's evidence, have prevented this accident, since he had not discovered that the window in question was in any way defective and accordingly would have had no occasion to use the wedge, unless he

[21] In *General Cleaning Contractors, Ltd.* v. *Christmas* [1953] A.C. 180, 192.

[22] Lord Normand has mentioned three: "To guard against possible misunderstanding it may be well to add here that the seriousness of the injury or damage risked and the likelihood of its being in fact caused may not be the only relevant factors. For example, Asquith L.J. in *Daborn* v. *Bath Tramways Motor Co., Ltd.*, pointed out that it is sometimes necessary to take account of the consequences of not assuming the risk" (*Paris* v. *Stepney B.C.* [1951] A.C. 367, 382).

[23] [1951] A.C. 367, 385.

[24] [1953] A.C. 180, 198. The other members of the House revealed similar diffidence on the matter, but ultimately took the view that the judgment in favour of the plaintiff should be upheld on the basis of the failure to provide wedges or blocks, these being reasonably practicable and feasible precautions; *cf. ibid.* at p. 193, *per* Lord Reid.

had been instructed that wedges must be used in all windows of this type whether defective or not."

In *Morris* v. *Hartlepool Steam Navigation Co. Ltd.*,[25] Lord Reid commented that:

> " the consequences of any accident were almost certain to be serious. On the other hand, there was very little difficulty, no expense and no other disadvantage in taking an effective precaution. . . ."

Thirdly, conformity evidence sharpens the requirement that the plaintiff prove negligence by showing that the defendant could not have learnt how to avoid such an accident from the example set by other members of his industry.

There is another way in which evidence of custom may be relevant: when combined with evidence of rarity of accidents, such evidence proves the customary practice to be innocuous. In order for a defendant to be held liable in a negligence action, his conduct must be shown to have a tendency to cause harm, or to be fraught with a reasonable probability of injury,[26] before any questions of foreseeability are canvassed.[27] Custom evidence combined with a showing of rarity of injury indicates that the practice is not even dangerous.[28] This use of evidence of practice has been mentioned in some of the cases. For instance, in *Morris's* case, Lord Reid observed:

> " It was argued that, whether the practice of leaving the hatches unprotected was good or bad, the respondents were entitled to rely on it because it had gone on a long time and no one had heard of an accident arising from it. I would agree that, if a practice has been generally followed for a long time in similar circumstances and there has been no mishap, a reasonable and prudent man might well be influenced by that, and it might be difficult to say that the practice was so obviously wrong that to rely on it was folly. . . ." [29]

Graham L. Fricke.*

25 [1956] A.C. 552, 575; *cf. ibid.* at p. 576, *per* Lord Tucker: " [The risk] was obvious, its consequences were likely to be calamitous, and the remedy was simple and available "; and *cf. ibid.* at p. 580, *per* Lord Cohen: " the risk . . . could easily have been avoided. . . ."

26 *Bolton* v. *Stone* [1951] A.C. 850.

27 Consider cases such as *Roe* v. *M.O.H.* [1954] 2 Q.B. 66. In that case the conduct of the hospital staff was in fact dangerous, but, in view of the existing medical knowledge, they could not be held to have reasonably been able to foresee the danger.

28 *Cf.* Morris, *op. cit.*, *supra*, note 19, 1151: " The whole line of proof bears on whether the defendant's conduct entails undue risks. Proof of conformity alone does not go so far toward establishing due care: some usages are continued even though experience should indicate that they are unsafe."

29 [1956] A.C. 552, 574.

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REPORTS OF COMMITTEES

First Report of the Council on Tribunals

The First Report of the Council on Tribunals is a comfortable document. A considerable part of this first year was devoted, says the Council, to the collection and co-ordination of material and to the consideration of the most effective methods of proceeding. Moreover, the Report does not deal with inquiries but only with tribunals and if the Council does ever bare its toothless (advisory) gums, it will be in the face of inquiries. But so far we have: "In the course of our visits to tribunals we have found that the great majority of chairmen whom we have seen in action (whether with legal qualifications or not) perform their duties very well.[1]. . . At present we can say no more than that, with only a few exceptions, the numerous tribunal members whom we have seen in action seem to be well qualified for their work and to carry out their duties diligently, sympathetically and impartially.[2]. . . The great majority of the chairmen [of Rent Tribunals] now possess legal qualifications and we have found the quality of the membership to be on the whole satisfactory. The few cases where improvement appeared necessary have been brought to the attention of the Lord Chancellor or the Minister of Housing and Local Government as appropriate.[3] . . . All the [National Insurance] tribunals visited appeared to handle the cases which came before them sympathetically and well,[4]. . . the [National Assistance Appeal] tribunals work well.[5]. . . All these [Military Service] tribunals appeared to be functioning satisfactorily.[6]. . . The [Independent Schools] Tribunal's conduct of the proceedings was reported to be excellent.[7]. . . The few [Agricultural Land] tribunals visited appeared to be functioning satisfactorily.[8]"

All this we thought to be the case in general terms. But the Council was not set up to state banalities. Partly the fault lies in the language of the Report. It is badly written. The first paragraph, for instance:

"This is the first statutory Annual Report of a body which is not only recently established by Parliament but is also unique in character." The two propositions in the relative clause are distinct with no logical or semantic connection. They cannot support

1 Para. 30 of the Report.
2 Para. 52.
3 Para. 85.
4 Para. 97.
5 Para. 100.
6 Para. 103.
7 Para. 108.
8 Para. 110.

a " not only . . . but is also " construction. Again, in paragraph 3: " Moreover, the Tribunals responsible for these decisions are themselves not administrative but adjudicatory, whilst the Council's responsibilities in relation to the tribunals are in no way adjudicatory but are purely advisory and consultative. . . ." The opposition of the two propositions separated by " whilst " is meaningless and can be set against one another only by using " adjudicatory " in two totally different senses. Stylistic blunders of this sort recur throughout.

The language of the Report is not only clumsy but woolly. We want to know not the general excellence but the particular defects. How bad was the minority of chairmen? What were their faults? What did the exceptional members do wrong? What was the nature of the faults reported to the Lord Chancellor and the Minister? Is any distinction felt, and if so what, between the commendatory phrases quoted above: " very well . . . diligently, sympathetically and impartially . . . sympathetically and well . . . work well . . . appeared to be functioning satisfactorily "? When the Report has a general criticism to offer, it is wrapped up like this: " The Conscientious Objectors' Tribunals have a particularly difficult task and it was evident that the tribunals made every effort to arrive at a fair decision in each case." (Really? *Every* effort in *each* case?) " But in our view a Conscientious Objectors' Tribunal which has been engaged over a long period of time in the hearing of cases of this kind may be in some danger of adopting a rather stereotyped approach." [9] " May be " or " is "? Why weaken " danger " by " some "? Were they only in "danger " or did they actually adopt the approach? Was " rather " necessary?

How far this criticism of Conscientious Objectors' Tribunals is justified is a very different matter. A Tribunal with the function of testing the sincerity of objection to National Service has to evolve rules as to classification or simply hope its hunches are right. Some form of stereotyping may be a most desirable self-discipline.

The Council found anomalies when they looked at the remuneration of chairmen and members. They recommended that the Chairmen of Rent Tribunals should be paid more and they promised further investigation to be followed by further recommendations. At this point the Council seemed to feel that they might conceivably upset some people by this mercenary approach. And so out of its pigeonhole comes that common form paragraph so often inserted at this point: " Before we leave this topic " (a primary schoolmaster would put his blue pencil through that superfluous phrase) " we should like to stress that we do not underestimate the value of the unpaid service that is very readily given on many tribunals. This country is fortunate in the fact that so many able men and women are public-spirited enough to undertake this form

[9] Para. 104.

of work and we have been impressed by the willingness and efficiency with which they do so." [10] The psychology of those in petty power is not so simple as that. Let us pay more in the hope that we shall have better "public spirits."

"One problem is that the existence of the Council continues to be known to only a limited number of people and that even fewer understand what it can and what it cannot do." [11] ("Few people know that the Council exists and even fewer know its functions" is what is meant, but let it pass.) But this is the dilemma. The Council was consulted about fifteen sets of procedural rules and the Report tells us what happened in eight of these cases. Its function seems to be very similar to that of the National Insurance Advisory Committee. It is a valuable but not a popular function and that Committee has been performing it for more than ten years without being "known." The Council can go further than the Committee but if it is not willing to report publicly what defects it finds in what specific tribunals, it too will not be known. For a body to be, in this sense, popular, it must catch the imagination of the public. One way seems to be open. The Council reports: "There appears still to be a good deal of misunderstanding and ignorance on the part of the general public about our functions and duties. . . . Nevertheless, we do receive amidst much that is irrelevant some useful comments and complaints on matters which come within our purview. These we investigate by a visit to the tribunal concerned or by interviewing the complainant or by other suitable methods, and where necessary we take up the matter with the appropriate Departments." [12] Tell us about them; tell the Press about them; without naming persons but making quite clear the nature of the complaint, and the result of the investigation. Then we, the general public, may become interested. "We are commonly described as 'watchdogs' for the public and we must look to them in large measure to inform us of matters requiring to be watched" is almost the last paragraph in the Report. But watchdogs are *known* to bite or at least to bark. This is their attribute. A watchdog which only watched would soon lose his job. The Council on Tribunals does more than watch, but if it seeks support and interest, then it must snap in public.

It would be unfair to deduce too much from a first Report. But on this evidence, the Council on Tribunals looks like being just another advisory committee, too cautious, too gentlemanly, too velvet-gloved to be effective or to establish itself as an organisation which will inspire much public enthusiasm.

J. A. G. Griffith.

[10] Para. 36.
[11] Para. 27.
[12] Para. 25.

NOTES OF CASES

A Corporations Ombudsman?

Section 209 of the Companies Act, 1948, has always been something of a puzzle. Maugham J. was "not quite able to understand" why it was ever enacted.[1] Professor Gower has suggested that it marks Parliament's implied recognition in 1929 of a common law rule (suggested by two, "somewhat blown upon," first instance decisions [2]), prohibiting expropriation of minority members' shares by changes in a company's articles of association.[3] It is appropriate that such a section should come under critical scrutiny in 1960, the year which marks the appointment of the Jenkins Committee on Company Law Amendment. This has occurred in the interesting decision of Buckley J. in *Re Bugle Press Ltd.*[4]

Section 209 deals with the situation in which a small number of shareholders remains as a minority in a company of which another company has bought the bulk of the shares. Where, in any such scheme or contract, the take-over company has, within four months of its offer, had that offer accepted by nine-tenths in value of the shares, it may give notice to the remaining shareholders. Thereby it becomes entitled and bound to acquire the minority shares, unless on a dissentient's application the court orders otherwise.[5] Conversely, the minority can themselves enforce their own expropriation by giving notice to the take-over company that they wish to be bought out, on the same terms as the other 90 per cent.[6] The English courts have always placed a very heavy burden of proof upon any dissentient who asked for relief under the first limb of the section. True to their tradition in such matters of bowing to the superior wisdom of men of business, the courts have been reluctant to disturb any scheme which has secured the approval of nine-tenths of the shareholders (in value) because "prima facie the best judges of the scheme are the shareholders themselves." [7] In case after case the unhappy applicant has failed

1 *Re Hoare* (1933) 150 L.T. 374, 376.

2 *Brown* v. *British Abrasive Wheel Co.* [1920] 1 Ch. 154; and *Dafen Tinplate Co.* v. *Llanelly Steel Co.* [1920] 2 Ch. 124.

3 Gower, *Modern Company Law*, 2nd ed., p. 514. The Court of Appeal in *Shuttleworth* v. *Cox* [1927] 2 K.B. 9, and *Greenhalgh* v. *Arderne Cinemas* [1951] Ch. 286 blew hard enough, it will be suggested, to knock the two earlier cases flat on their backs.

4 [1960] 2 W.L.R. 658; [1960] 1 All E.R. 768.

5 s. 209 (1). The further proviso in the section is irrelevant to the present discussion.

6 s. 209 (2). In case of dispute the minority, or the company, can apply to the court to settle the terms.

7 Wynn-Parry J. in *Re Trinidad Oil Co.* (1957) *The Times*, April 13. For the same attitude elsewhere see, *e.g.*, on "fraud" in changing the articles, Scrutton L.J., *Shuttleworth* v. *Cox* [1927] 2 K.B. at p. 23; and on reductions of capital, Lindley L.J., *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch. at p. 409.

to prove unfairness.[8] Indeed, it has become difficult to see how he possibly could do so. As Vaisey J., with a military flourish, put it in a hitherto unreported decision,[9] the onus is " undoubtedly the heavy one of showing that he, being the only man in the regiment out of step, is the only man whose views ought to prevail." In similar parade-ground tone, his lordship demanded that, before relief can be given, the " scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence." [10] The importance of *Re Bugle Press Ltd.*[11] inheres initially in the fact that Buckley J. for the first time put the burden of proof of fairness on the take-over company; but three general points of interest arise.

The dissenting shareholder, T., was one of the three members of Bugle Press Ltd., a company with an issued capital of 10,000 £1 shares of which he held only 1,000. The 90 per cent. majority pair, J. and S., wishing to buy him out, incorporated J. and S. (Holdings) Ltd., which, as its sole business transaction, made an offer to all three shareholders to buy their shares in Bugle Press Ltd., and later gave notice to T., exercising the right compulsorily to buy his shares. The price offered was based on a valuation of the company's share capital by accountants who had access to the accounts and other relevant information. Although J. and S. were (not surprisingly) prepared to accept this offer made to them by their corporate offspring, T. was not. He alleged that other persons put a different value on the shares and that the valuers had not taken proper account of certain factors in their valuation. He put that valuation in as part of his evidence in order to criticise it. J. and S. (Ltd.) put in no evidence. And indeed, if this heavy onus of proof was on T., what need was there to put in any evidence? His criticisms of the scheme, even if they were accepted, certainly did not prove that it would look unfair in the eyes of a moron of the " meanest intelligence."

This failure to adduce evidence is the basis of the judgment. Buckley J. accepted that normally a heavy onus would rest upon the dissentient. But this case was quite the reverse of the normal because " although as a matter of law the body making the offer must be regarded as distinct from the persons who hold shares in that body, nevertheless as a matter of substance the persons who are putting forward this offer are the . . . holders of the 90 per cent. majority shareholding, whose acceptance of that offer it is suggested binds the dissenting shareholder also to accept the offer." [12] In such a case, the court would place the onus on the other side, upon the take-over company, to prove affirmatively the fairness of the scheme. To do so, they should have filed evidence. They had not

[8] See especially *Re Hoare* (1933) 150 L.T. 374; *Re Press Caps* [1949] Ch. 434.
[9] *Re Sussex Brick Co., Ltd.* (1959) now reported in [1960] 2 W.L.R. 665 and [1960] 1 All E.R. 772.
[10] [1960] 2 W.L.R. at p. 667; [1960] 1 All E.R. p. 774
[11] [1960] 2 W.L.R. 658; [1960] 1 All E.R. 768.
[12] [1960] 2 W.L.R. pp. 663–664; [1960] 1 All E.R. p. 771.

done so and had therefore not discharged their burden, so the application must succeed. In reaching this decision his lordship did not decide the question whether section 209 could be allowed to operate according to its tenor, even if, in such a case, the take-over company *did* prove the fairness of the scheme; but he saw " very great force " in the argument that the policy of the section should not be thwarted merely by the incorporation of a company like J. & S. (Holdings) Ltd. In such a case no " independent majority " exercised a " disinterested choice " in accepting the offer, and the transaction would be only a device to enable a 90 per cent. majority to buy out the minority " through the medium of the company formed *ad hoc*." [13]

Three questions of interest which arise from this judgment are (i) the policy of section 209; (ii) the present position in regard to piercing the corporate veil; and (iii) the function of the court in such matters as the present application and the question whether some other machinery should be devised for their solution.

(i) *Section 209.* First, why have such a section at all? The Greene Committee of 1926, which recommended its introduction into company law, saw a need to prevent holders of a small number of shares from sinking a take-over and thereby " oppressing " the majority.[14] Seen thus, the section is a mighty steamhammer for the cracking of rather small nuts. The argument requires that the take-over company will refuse to go ahead if the 10 per cent. recalcitrant holders remain, which it will not always do. (Also, it assumes (as apparently the Greene Committee assumed) that a 75 per cent. voting majority cannot eject dissentients if necessary, a view which we have seen has the support of Professor Gower. It is submitted that the " fraud " cases *on changing the articles* [15] show that there is no rule prohibiting absolutely the compulsory transfer of minority shares where the majority acts honestly.) A better reason, however, for the section is its promotion of certainty. The offer conditional on 90 per cent. acceptance is now a commonplace of take-overs. It is also useful, and certainly accords with the English " disclosure philosophy," to have a section which promotes general offers to shareholders in the place of take-over operations of a more secret and undisclosed character. If that were the reason for retaining the section, its insistence upon a " scheme " would be supportable. But would 90 per cent. then be the correct figure? Is there not a case for the promotion of open take-over procedures at a much lower level? If this section is to be

[13] *Ibid.*

[14] Company Law Amendment Committee Report (1926), para. 84, pp. 43–44.

[15] *e.g.*, *Greenhalgh* v. *Arderne Cinemas, Ltd.* [1951] Ch. 286. The shareholder's right is here a right to sue in a *personal* action, part of his personal right to have the articles and their procedures enforced. It is otherwise in some other " fraud " cases, *e.g.*, the cases on expropriation of corporate property by the majority, because there the member must challenge the fraud on behalf of the company in a *corporate* action couched in representative form; see [1957] C.L.J. 194; p. 205; p. 211, note 14; [1958] C.L.J. p. 93.

one tool to do that job, and if the argument above about the "fraud" cases is correct, the proportion might well be reduced to 75 per cent.—the same figure as the voting majority required to change the articles.[16]

Secondly (if there is to be such a section), why should it apply only to a take-over "*company*"? Section 209 is obscure in that it applies to any "company whether a company within the meaning of this Act or not." Since by section 455 "company" in the Act means "a company formed and registered under this Act or an existing company," the meaning is not piercingly obvious. It is usually assumed that no individuals or partnerships are covered.[17] But why should they not be? All the arguments advanced for the retention of the section can be as effectively used as when a company is taking over. Furthermore, under section 209 (2) the minority is given *its* rights only against the take-over company. Why not against the take-over firm or individual? This is not the only anomaly in the section which needs reform [18]; but it is perhaps the most odd. The section is already prepared to look behind "nominee" shareholdings in both subsections, so that no further problems would be created by letting in individuals, along with companies, extra to those which are created by the corporate personality of the apparent take-over company in cases like *Re Bugle Press*.

(ii) *The corporate veil.* The view of Buckley J. that there was "great force" in the argument that the court ought, in any case, to pierce the corporate veil of J. & S. (Holdings) Ltd. marks one more occasion on which the English courts have put aside *Salomon* v. *Salomon* [19] while paying lip-service to its principle of the corporate legal entity. There is an urgent need for some principles to be injected into this area of law. The frequency with which judges are prepared to ignore the corporate entity is perhaps increasing.[20] While this may do admirable justice in a particular case, it is scarcely satisfactory that the litigant is not able to tell whether his judge will or will not ignore it. After the decision in *The Abbey, Malvern Wells* case,[21] this nettle in the midst of company law has grown stronger every year. Will the Jenkins Committee have courage enough to seize it by suggesting that some

16 With appropriate alterations to 75 and 25 per cent. in s. 209 (2).

17 *Quaere* whether some partnerships or other types of association would not be included. "Company" is not a legal term: Buckley J., *Re Stanley* [1906] 1 Ch. 131, 134. Perhaps the section includes anything in the nature of a modern "deed of settlement company," if such exists. Or does "company" here mean "corporation"?

18 It is to be hoped that, at least, s. 209 (2) will be changed so as to give the minority its rights where a bid is made by a subsidiary of a company already holding a block of the shares in question. At present it affords no protection in such a case.

19 [1897] A.C. 22.

20 See recently, *e.g.*, *S.C.W.S.* v. *Meyer* [1959] A.C. 324, *per* Viscount Simonds, pp. 342–343; and *Re Greater London Properties, Ltd.* [1959] 1 W.L.R. 503.

21 *The Abbey, Malvern Wells, Ltd.* v. *Min. of Local Govt.* [1951] Ch. 728.

legislative guidance be given to the judges in their work on this point?

The circumstances in which the veil should be torn aside are so various that no statute could hope to set them all out. On the other hand, it would not be impossible for a statute to permit this course in specified cases, without prejudice to others. It has often been pointed out that many of the problems at the heart of English company law spring from our artificial legal concept of " capital " and our lack of an effective sanction to ensure that some minimum of economic capital is in the hands of the company.[22] Experience in the United States [23] ought surely to encourage us (if still we are to have no rules demanding a minimum paid-up capital) to experiment with the removal of the corporate mask in cases of undercapitalisation. A statute could empower the court in any case where it seemed that inadequate capital had been put into the enterprise to ignore the " personality " of the company to the extent needed to produce a just result. There are a number of other particular instances on which a start might be made, *e.g.*, piercing the veil where a statutory obligation is being evaded.[24] It would be undesirable to attempt to legislate any more extreme solution than this; but it could be hoped that such a section in the Act would encourage the courts more quickly to carve out principles to govern non-recognition of the corporate person based, as are many U.S. cases, on the fundamental notion that " a corporation will be looked upon as a legal entity as a general rule . . . but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime the law will regard the corporation as an association of persons." [25] It is, perhaps, time—here as elsewhere—to remind those who make use of the boon of incorporation with limited liability that it is a privilege which can be removed if injustice is worked by its use. The next Companies Act could be the foundation-stone of a new structure of rules allowing for the penetration of the corporate veil where justice demanded. Under such an Act there would be no doubt

22 See Prof. Kahn-Freund's remarks in (1945) 7 M.L.R. 54, " Some Reflections on Company Law Reform," p. 57 *et seq.*

23 See *Pepper* v. *Litton* (1939) 308 U.S. 295; *Taylor* v. *Standard Gas & Electric Co.* (1939) 306 U.S. 307 (the " Deep Rock " case); *Automotriz del Golfo de California* v. *Resnick* (1957) 47 Cal. 2d 792 (where R. and two associates used a mask corporation to import cars from Mexico; it was barely capitalised at all and used their private funds from time to time to pay. *Held*: the three were personally liable for the price of the cars); *Luckenbach S.S. Co.* v. *Grace & Co.* (1921) 267 F. 676. The English courts do have available the notion of " implied agency " by use of which they could reach the same result as the *Resnick* case; but it is very difficult to predict when use will be made of it (see Gower, *Modern Company Law*, p. 195), and it would be more honest openly to discard the corporate entity.

24 Our courts ought surely not to be more afraid of this foray into " abuse of rights " doctrines than are the U.S. courts: see, *e.g.*, *U.S.* v. *Milwaukee Refrigerator Co.* (1905) 142 Fed. 247 (affd. in part 145 Fed. 1007); *Anderson* v. *Abbott* (1944) 321 U.S. 349; 151 A.L.R. 1146 (Douglas J.).

25 *U.S.* v. *Milwaukee Refrigerator Co.*, *supra*, p. 255, Sanborn J.

that the 90 per cent. majority in a case like *Re Bugle Press* could not make use of section 209 by means of a phoney incorporation, if unfairness would be caused.

(iii) *A Corporations Commissioner?* Finally it seems fitting to ask just what is the function of the court in a case of this kind? It has to decide whether the scheme is "unfair." But so often, as here, it never approaches near to that problem. In courts fitted out for adversaries to do battle before the presiding umpire, it is hardly surprising that an inquisition into the facts is often replaced by decisions turning, as did *Re Bugle Press*, upon twists in the burden of proof and fortuitous gaps in the pleadings. And, in all this, the court seems able, after *Re Bugle Press*, to produce any required result by readjusting that burden. But in doing so it will not have any independent report upon what result is required for justice to be done.

One is bound to ask whether a High Court judge is the proper person to exercise this function, and a lot of other similar functions, in company practice. In Scotland, on such questions an independent expert is appointed and makes his own report to the court. Are English judges that much wiser that they need no help? They *say* that they are *not* wise in such questions. The tradition of disclaiming knowledge of business was followed by Buckley J. when he said: "in all commercial matters where commercial people are much better able to judge of their own affairs than the court is able to do the court is accustomed to pay the greatest attention to what commercial people who are concerned with the transaction in fact decide." [26] If the judges were taken at their word, the function of sanctioning or reviewing take-over schemes, reconstructions, reductions of capital, and the like, should be taken from them and vested in a new commercial officer who would have power to go inside the company and ferret out the facts.

There is a growing awareness that the future control of companies and their management will need a much more active administrative agency than the Companies Division of the Board of Trade can at present be. To say that is not to propose that we should accept an agency equivalent to the Securities Exchange Commission. But the need for some extra and agile supervisor is felt more and more as the power of shareholders to control is demonstrated to be ineffectual. Dr. Schmitthoff has suggested recently [27] that there should be a new division of the Board created

[26] *Re Bugle Press* [1960] 2 W.L.R. p. 663; [1960] 1 All E.R. p. 771.

[27] [1960] J.B.L. p. 151 at pp. 157-159. The Stock Exchange has served investors well but the "future protection of the small investor, however, is a matter of public interest; it cannot be left in the hands of a private organisation with members who may find themselves in a conflict of interest and duty.... The new Division should become the watchdog of the small investor and the investing public in general." For last-ditch efforts to suggest ways of using the traditional mechanisms of shareholders' control as an effective brake on management, see Rice [1960] J.B.L. 308, "Good and Bad Take-over Bids."

which would be charged with the task of protecting the small investor, and to which he would give certain special powers. But an alternative way of introducing new machinery might be to give to a Corporations Commissioner the powers now exercised by the courts in regard to sections such as section 209, and, possibly, whenever anything like appraisal rights are in issue. To be effective, such a Commissioner should have power also to intervene of his own initiative, and to pronounce upon the fairness of the scheme or other reorganisation. If it be thought by anyone that this suggestion is objectionable as being unfitted to a mixed " free economy," we can point to the free economy of California and to the Commissioner under the California Corporations Code. There the Commissioner has jurisdiction over all forms of sale, exchange, and alteration of rights, etc., of securities; and his jurisdiction gives him the right to decree whether or not the transaction is " fair, just and equitable," [28] in particular that it is honest and fair to *all* security holders. If he forms an adverse view he may withhold his permit. It may be thought that this would lead to bureaucracy and a stranglehold, or as Professor Loss said " a life and death power over virtually the entire industry of the country." But apparently this is not the Californian experience. Practitioners write of the beneficial effects and practical results of the scheme [29]; and Professor Jennings has pointed out that it is specially useful if any sort of check is to be kept on mergers [30] (something noticeably lacking in England). What is more important is that any such Commissioner in England would have a ready-made field in which to begin operations. His would be the task of inquiring and adjudicating [31] under sections 209, 66 (reduction) and 206 (arrangements). But more, he should have power in any case himself to initiate " oppression " proceedings under section 210. Also, his could be the voice which decided that insufficient information was being given by the management, so as to require an Inspector, under section 165. He could provide the needed supervision of the liquidator in a voluntary winding up. His could be the permission required to dispense with a " two-way proxy." [32] And if, as suggested recently,[33] beneficial ownership should be

[28] For a description of the Californian position see Prof. R. W. Jennings' valuable article in (1958) 23 *Law and Contemp. Problems*, p. 193: " The Role of the States in Corporate Regulation and Investor Protection."

[29] Orschel (1952) 4 Stan.L.R. 215.

[30] Jennings, *loc. cit.* p. 217. At p. 214 he says: " While at first glance these provisions may seem unduly to hamper legitimate business, experience has shown that enough cases arise where supervision is needed to justify the inconvenience." One cannot, after the last two years, confidently assert that English experience lacks such cases.

[31] Obviously on some matters appeals would go to the courts, but this point is not further discussed here.

[32] See on this problem the Cohen Committee's Report on Company Law Amendment, p. 81.

[33] C. H. Feinstein and J. R. S. Revell, " Who Owns Ordinary Share Capital? " *The Times*, June 23, 1960. The proposals of these two economists are a

compulsorily revealed in shareholdings below a certain size, what more fitting than that the Commissioner should have power at any time to discover and declare the beneficial ownership of any other holdings, or of any holdings not properly disclosed?

The list of appropriate tasks (especially in " take-over " situations) could plainly be extended to great length. As he grew into the system from these very natural roots, the Commissioner might, to use a fashionable analogy, become a kind of Corporations Ombudsman, ready to investigate, probe, or adjudicate in the interests of shareholders, and, it is to be hoped, eventually of the employees and the community. If he is to be part of the Board of Trade, he must retain sufficient energy and initiative to play a preventive, and not merely a curative role in the system. If the Jenkins Committee is bold enough, in this sphere it may invent new machinery of lasting benefit and importance to company law and English society.

K. W. Wedderburn.

Florists and Co-operators in the Court of Appeal

The reversal by the Court of Appeal [1] of Salmon J.'s decision in *Att.-Gen.* v. *Harris* [2] is regrettable but, having regard to the state of the authorities, hardly surprising. Salmon J. had held that the persistent breaches of the criminal law committed by the defendants by selling flowers outside a cemetery had not injured the public and ought not to be restrained by an injunction. But Sellers L.J. expressed the opinion that it could not be " anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law " [3]; and Pearce L.J. observed that " a breach with impunity by one citizen leads to a breach by other citizens, or to a general feeling that the law is unjustly partial to those who have persistence to flout it." [4] Unless the House of Lords (to which leave to appeal was granted) is prepared to lay down a different set of considerations to determine when civil sanctions are to be applied for the suppression of crimes—and none of the relevant precedents relied on by the Court of Appeal is binding on it—one must accept that only in highly exceptional circumstances will the courts refuse to award the Attorney-General an injunction against the perpetrator of repeated criminal offences created by regulatory legislation. Nevertheless, in the present case it was reaffirmed

welcome sign that not everyone has forgotten that the price paid in 1855 for limited liability was supposed to be disclosure—including disclosure of the identity of shareholders.

1 [1960] 3 W.L.R. 532; [1960] 3 All E.R. 207; for further proceedings, see *The Times*, September 21, 1960, p. 3.

2 [1960] 1 Q.B. 31 (noted 22 M.L.R. 535).

3 [1960] 3 W.L.R. at p. 537.

4 [1960] 3 W.L.R. at p. 545.

that the courts do have a discretion in the matter, and by approving Lush J.'s decision in *Att.-Gen.* v. *Kerr and Ball*,[5] Sellers L.J. appears to have conceded that the actual impact of the breaches of the law on the public is a factor that can properly be taken into account.

The Court of Appeal has also affirmed the decision of the Divisional Court [6] in *R.* v. *Barnsley Licensing JJ.*[7] The court held that the justices (who had granted a spirits off-licence to a co-operative society of which all but one of them were members) were disqualified both under section 48 (4) of the Licensing Act, 1953, and at common law, inasmuch as they were interested in the profits of the business, but that their acts were validated by section 48 (5). Their acts would not have been validated, however, if they had been subject to a common law disqualification not comprised within section 48 (4), or if there had in fact been a real likelihood of bias arising from their pecuniary interest or any other cause. No reference was made in the judgments to the common law doctrine of necessity as a ground for holding them not to be disqualified, though it is believed that this would have provided a complete answer to the applicant's contentions in so far as they rested upon disqualification subsisting at common law. The decision of the Court of Appeal will not, of course, be of any assistance to the justices if they are ever prosecuted under section 48 (6) of the Act for having acted while subject to a statutory disqualification.

It is to be hoped that Devlin L.J.'s formulation of the test of " real likelihood of bias " will be applied in other contexts where the manner of exercising judicial functions is called into question. He said [8]:

> " We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias—not merely that that was the sort of impression that might reasonably get abroad."

The present writer has argued elsewhere in favour of an objective test of this character. Devlin L.J. added that the court might come to the conclusion that there was in fact a real likelihood of bias without impugning the affidavit of a member of the tribunal that he was not biased. Bias might be unconscious, and the matter had to be determined by the court upon the probabilities to be inferred from the circumstances in which the tribunal had sat.

S. A. DE SMITH.

5 (1915) 79 J.P. 51 (continued contravention of by-laws by erection of bungalows; buildings were fit for occupation and if demolished would be replaced as dwellings by tents).

6 [1959] 2 Q.B. 276 (noted 22 M.L.R. 669).

7 [1960] 3 W.L.R. 305; [1960] 2 All E.R. 703.

8 [1960] 3 W.L.R. at p. 319.

Executive Discretion Again

Slowly some of the subtleties of the law of landlord and tenant are being refurbished, if not exactly modernised. In *Warner* v. *Sampson*,[1] relics of feudalism (which in modern times have often as much relationship to the real thing as Scottish baronial architecture has to genuine fortification) were tidied up in the context of the denial by the tenant of his superior's title. In *Commissioners of Crown Lands* v. *Page*,[2] the converse situation, that of " eviction " by the landlord is dealt with. Some light was shed upon the qualities which must be possessed by an act if it is to be classed as an " eviction " so as to terminate the lease. Some of the remarks upon the quality of " wrongfulness " are of interest, as are those upon the quality of permanence which the act should have. It is difficult, once an emergency has ended and derequisitioning has taken place, to be certain how the act of requisitioning would have been regarded before either had occurred. It is noticeable however that in *Minister of State for the Army* v. *Dalziel* [3] an occupation of property under somewhat similar regulations was regarded as a " taking " of that property, simply because, like the emergency, it was initially of indefinite duration.

These matters though of interest were not exhaustively discussed, since the case was decided upon a more interesting and more general principle. The lease had been made in 1937 between the King's Most Excellent Majesty of the first part, the Commissioners of Crown Lands of the second part, and the defendant's predecessor in title of the third part. In 1945, the Minister of Works acting under the Defence Regulations, 1939, continued in force by the Supplies and Services (Transitional Powers) Act, 1945, and later legislation, requisitioned the property. The requisitioning endured until 1955, and it was this which was claimed to amount to an " eviction." In the first place, Lord Evershed M.R. held that the disturbance of the tenant by the process of requisitioning, granted the compensation provisions, was not sufficient to be an eviction. The tenant was put in no worse position than he would have been had he granted a sub-tenancy. More importantly, while it was conceded that the act to have that effect must be in some sense " wrongful," it was held *per* Lord Evershed M.R. that the covenant for quiet enjoyment implied from the word " demise " must be treated as qualified to the extent that it would not prevent " the future exercise by the Crown of powers and duties imposed on it in its executive capacity by statute." [4] This principle was restated in a slightly broader, and, in some ways, perhaps preferable form, by Devlin L.J., saying " When the Crown, or any other person, is entrusted, whether by virtue of the prerogative or by statute, with

1 [1959] 1 All E.R. 120.
2 [1960] 2 All E.R. 726; [1960] 3 W.L.R. 446.
3 (1944) 68 C.L.R. 261.
4 [1960] 2 All E.R. at p. 732.

discretionary powers to be exercised for the public good, it does not, when making a private contract in general terms, undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers and in the exercise of its discretion." The limitation to statutory powers in the formulation of Lord Evershed was proper and reasonable in this case, but it is as well that the effects of the exercise of common law powers should be emphasised at the same time. Had the King entered by the Minister of Supply to dig for saltpetre, in the classic formula of the common law, the result must have been the same.

The case contains the first clear exposition of a general principle which did underlie other decisions, but which was not made so explicit. The existence of that principle has been argued at length, as have the consequences which should flow from its recognition.[4a] The most important consequence, that of compensation, could not be here explored, since the issue did not arise. So far as loss flowed from the act of requisitioning, there were provisions for compensation. For the rest, the lessee was in no worse position than he would have been had the act not occurred. In other cases in which the principle could be applied, the loss to the private contractor might be substantial, and it does not necessarily follow from acceptance of the principle that that loss should fall in its entirety on him, and indeed such a consequence is inconsistent both with the common law background of requisitioning, and with modern concepts of sharing burdens in society. That problem can best be approached otherwise than by the route of *ultra vires*, which was that favoured by Devlin L.J. Here the formulation " would not prevent . . ." of Lord Evershed M.R. is, with respect, to be preferred. To take the illustration, chosen by Devin L.J., of the contract made by the Crown which could not be fulfilled in time of war; there the Crown does not contract not to declare war, it simply makes a contract, the performance of which its subsequent political acts render impossible. At its making, the contract was perfectly valid, the inconsistency with other public functions becomes apparent only later. That was precisely the position in *William Cory & Son, Ltd.* v. *London Corporation*.[5] This initial validity, which is obscured by the use of the terminology of *ultra vires*, makes a claim to compensation, though not to damages, all the stronger.

Thus, while the present case is a step forward, it does not go all the way. The writer would, with respect, regard it as a step forward in the rejection by Lord Evershed M.R.[6] of the view " that in the present day and age no distinction should be drawn as to the legal effect of its or their actions between the Crown and ordinary

4a See my *Contracts of Public Authorities* (1954).
5 [1951] 2 K.B. 476.
6 At p. 733.

subjects "—which was how the Master of the Rolls summarised the views of Denning J., as he then was, in *Robertson* v. *Minister of Pensions*.[7] The recognition of a distinction is essential to progress. Equally important is the insistence by Devlin L.J. that the principle does not mean that " the Crown can never bind itself in its dealings with the subject in case it might turn out that the fulfilment of the contract was not advantageous." The inconvenient contract, the bad bargain, must be distinguished from that which turns out to be inconsistent with larger public obligations. That distinction is perhaps easier to emphasise than to make, and it remains to be seen how well, granted the present state of public law in this country, the courts will grapple with the difficulties of making it.

There will remain many problems, too, which were here avoided by concession; these are problems of agency and the like. Are, for example, the Crown Estate Commissioners, specifically created to have some independent existence, to be regarded simply as the same Crown which acts through a government department? Their history would perhaps require a negative answer. What of a Crown contract which is affected by the actings of a nationalised industry, actings which although agreed to by a Minister are yet those of a distinct body? Certainly this branch of law has not by this decision arrived at a conclusion; it is, though, a decision which enables lawyers to travel hopefully, which, on good authority we are told, is a happier state.

J. D. B. Mitchell.

Trespass to the Person
Must Intention or Negligence be Proved?

In *Beals* v. *Hayward*,[1] McGregor J. in the Supreme Court of New Zealand added another chapter to the controversy on the question whether, in an action for trespass to the person, intention or negligence on the part of the defendant must be proved, and, if either must be proved, on whom lies the onus of proof. The rather peculiar facts of the case were that the plaintiff, a boy of sixteen, had, together with some companions of about the same age, caused considerable annoyance to the defendant by trespassing on his land, throwing stones and building " forts " in trees surrounding the defendant's property. On the day in which the incidents which gave rise to the action occurred, the boys, being asked by the defendant if they were throwing stones, admitted doing so, but not on the defendant's house. Later the defendant went into his house; the boys heard an upstairs window open, there was an explosion from a shotgun. The plaintiff was hit in the eye by a pellet and lost the sight of the eye. He claimed damages for assault.

[7] [1949] 1 K.B. 227.

[1] [1960] N.Z.L.R. 131.

The evidence as to the events which resulted in the injury to the plaintiff, came from the plaintiff himself. The defendant did not give evidence. A result of the annoyance to which he had been subjected, was that his mental faculties had become so impaired that, shortly after the events mentioned above, he had to be removed to a mental institution.

In answer to issues put by the learned judge, the jury said that the plaintiff was injured by pellets from a gun fired by the defendant, but that the act of the defendant was not an intentional assault. Negligence on the part of the defendant was not pleaded. On this answer, the learned judge, after hearing argument from counsel, gave judgment for the defendant. Though there is some difference of opinion on the part of textbook writers on this question, to which his Honour referred, the latest English decisions, *e.g.*, *Morriss* v. *Marsden* [2] and *Fowler* v. *Lanning*,[3] which he followed, favour the view that, in order to succeed in such an action, intention or negligence on the part of the defendant must be proved. His Honour also made reference to certain Canadian authorities. In *Eisener* v. *Maxwell*,[4] the court reviewed many of the cases dealing with actions for assault; but the purpose of that action was to determine whether such an action would, under the old forms of pleading, have been an action in trespass or in case. Different periods of limitation would have applied, according as the answer was given one way or the other. The decision is not therefore directly relevant to the question in issue in the case under review.

More to the point is *Walmsley v. Humenick*.[5] In that case the plaintiff was injured when he was struck in the eye by an arrow fired by another boy aged ten, the defendant. It was held that as the defendant lacked the necessary capacity to form a proper judgment, a cause of action based on negligence failed. It being admitted that there was no intent on the part of the defendant to injure the plaintiff, Clyne J. held that an alternative cause of action in trespass also failed.

Again, in *Joyce* v. *Bartlett*,[6] Williams C.J.Q.B. (Manitoba) followed *Stanley* v. *Powell*,[7] in holding that when a member of a hunting party is injured in a shooting accident, he could not recover against the person who fired the shot unless intention or negligence was proved.

McGregor J. did not, however, refer to certain Australian decisions which, though by no means conclusive, do throw some light on the question. In the New South Wales case of *Blacker* v.

2 [1952] 1 All E.R. 925.
3 [1959] 1 Q.B. 426.
4 [1951] 1 D.L.R. 816.
5 [1954] 2 D.L.R. 232.
6 [1955] 1 D.L.R. 615.
7 [1891] 1 Q.B. 86.

Waters,[8] the plaintiff had been struck in the eye by a fragment of a bullet fired by the defendant at a shooting-gallery. In the District Court, the judge found that though the injury was unintentional on the defendant's part, he was guilty of negligence, as he knew of the risk of damage to others from pieces of metal flying back, but had nevertheless taken that risk. The defendant appealed on the ground that there was no evidence to support the finding of negligence. The Court of Appeal (Street C.J., Ferguson and James JJ.) dismissed the appeal. In the course of his judgment, Street C.J. said (at p. 409): " The case was conducted on the assumption that in the absence of negligence the defendant was not liable. The trespass to the plaintiff's person was complete on proof that the lead which entered his eye came from the bullet fired by the defendant at the target, and the defence was that it was not actionable as it was neither intentional nor the result of negligence." [9] The learned Chief Justice did not, however, go on to consider the question whether an action would lie merely on proof of the fact of the injury done by the defendant, but dealt with the burden of proof, holding that the burden of proving that the accident was neither intentional nor the result of negligence lay with the defendant. On the question which is the subject of this note the decision is, at best, inconclusive.

The question was adverted to by the High Court of Australia in *Williams* v. *Milotin*.[10] In this case the question before the court was whether a running-down action, when the defendant was himself driving the vehicle, was an action which would formerly have been brought in trespass, or one which would formerly have been brought in case. Different periods of limitation applied to the two actions. The court held that the action could formerly have been brought either in trespass or in case. But the court (which was presided over by Dixon C.J.) said (at p. 474): " The essential ingredients in an action of negligence for personal injuries include the special or particular damage—it is the gist of the action—and the want of due care. Trespass to the person includes neither. But it does include direct violation of the protection which the law throws round the person. It is true that in the absence of intention of some kind or want of due care, a violation occurring in the course of traffic in a thoroughfare is not actionable as a trespass. It is unnecessary to enquire how that comes about. It is perhaps a modification of the general law of trespass to the person." Though it is not stated directly, the words used might well imply that, in the opinion of the court, an action of trespass to the person not occurring in the course of traffic was actionable " in the absence of intention of some kind or want of due care."

These Australian decisions are of particular interest at the

[8] (1928) 28 S.R. (N.S.W.) 406.
[9] See *Stanley* v. *Powell* [1891] 1 Q.B. 86.
[10] (1957) 97 C.L.R. 465.

present time, in view of the fact that there is pending before the Full Court of the Supreme Court of New South Wales, an action which raises the issue in a very practical form. A plaintiff who complained of the manner in which an operation had been performed on his ear, sued his doctor and (as recorded in 33 Aust. L.J. 322) included in his declaration an economically worded count in trespass to the person, thereby seeking to cast upon the defendant the burden of proving that he was in no way negligent. The defendant moved to have the count struck out on the ground that to sustain it the plaintiff must plead facts involving either intentional or negligent conduct on his part. In view of the importance of the question, the trial judge referred it to the Full Court. The decision of that body will be awaited with interest.

Having decided, in *Beals* v. *Hayward*, that in an action for trespass to the person it was necessary for intention or negligence on the part of the defendant to be proved, McGregor J. turned to the question of onus of proof. He held that the onus lay on the plaintiff. In this he followed the decisions of Stable J. in *Morriss* v. *Marsden* [11] and of Diplock J. in *Fowler* v. *Lanning*,[12] and rejected the contrary view expressed by Cartwright J. in the Supreme Court of Canada in *Cook* v. *Lewis*.[13] This was a shooting case in which there were two defendants. The jury were unable to decide which of the two defendants fired the shot which injured the plaintiff, though they did find that one of the defendants did so. They also found that neither defendant was negligent. The British Columbia Court of Appeal ordered a new trial on the ground that the jury acted perversely in finding that neither of the defendants was negligent. One of the defendants appealed. Cartwright J. in a judgment dismissing the appeal said (at p. 14): " While it is true that the plaintiff pleaded negligence on the part of the defendants he also pleaded that he was shot by them and in my opinion the action under the old form of pleading would properly be one of trespass and not of case. In my view, the cases collected and discussed by Denman J. in *Stanley* v. *Powell*,[14] establish the rule (which is subject to an exception in the case of highway accidents with which we are not concerned in the case at bar) that where the plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove ' that such trespass was entirely without his fault.' In my opinion *Stanley* v. *Powell* rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part."

But, as McGregor J. pointed out in the case under review, the

11 [1952] 1 All E.R. 925
12 [1959] 1 Q.B. 426.
13 [1952] 1 D.L.R. 1.
14 [1891] 1 Q.B. 86.

Court of Appeal in *National Coal Board* v. *J. E. Evans & Co. (Cardiff), Ltd.*,[15] rejected the view that, in this matter, there was any distinction in the law applicable to accidents on the highway and those on private property. The *National Coal Board* case was not referred to in the judgments in *Cook* v. *Lewis*. This is not a matter for surprise as the former case was reported only a few weeks before the decision was given in *Cook* v. *Lewis*. Distance can still be a hindrance, despite air travel, and English reports take time to cross the Atlantic. But, on this issue, *Cook* v. *Lewis* loses much of its force by reason of the fact that the *National Coal Board* case was not considered in that decision.

Beals v. *Hayward* is thus another authority in favour of the view that, in an action of trespass to the person, the plaintiff must prove either intention or negligence on the part of the defendant; and the onus of proof is on the plaintiff.

A. G. Davis.

Intent to Defraud

In the present year there have been two appeals to the House of Lords from decisions of the Court of Criminal Appeal. In the first, *Welham* v. *Director of Public Prosecutions*,[1] the decision of the Court of Criminal Appeal was upheld; in the second, *Director of Public Prosecutions* v. *Smith*,[2] it was reversed. In both, the House of Lords found for the prosecution and appeared to adopt what is sometimes, somewhat naïvely, thought of as the " practical " (as opposed to the " academic ") approach. Yet, in reality, the two cases provide an interesting contrast for, whilst *Welham* is as least compatible with precedent, *Smith* runs counter to what one had hoped were some of the most basic principles of criminal liability. Quite apart from the outcome of the cases and making due allowance for the processes of the common law, it is a poor reflection on our criminal law and administration that there should still in 1960 have been uncertainty surrounding the basic mental element required by such offences as forgery and murder.

Welham was the sales manager of a company dealing in motor lorries. He had witnessed the execution of hire-purchase agreements which he had known were forged and which resulted in large advances being made to the company by two finance companies. He was convicted of uttering forged (private) documents contrary to section 6 of the Forgery Act, 1913, an offence which, in view of section 4 (1), required proof of an intent to defraud. His conviction was upheld by both appeal courts on substantially the same grounds.

It was argued on his behalf that he had believed that the forged documents were designed to enable the finance companies to lend

[15] [1951] 2 K.B. 861.
[1] [1960] 1 All E.R. 805. Also reported at [1960] 2 W.L.R. 669.
[2] [1960] 3 All E.R. 161. This case is discussed at pp. 605–629, *ante*.

moneys which they would otherwise have been unable to lend because of current credit restrictions and because of the terms of their memoranda and articles of association. It was contended that there was no intent to defraud, since this belief, whilst admittedly accompanied by an intent to mislead the authorities concerned with the enforcement of credit restrictions, was not accompanied by an intent to involve the finance companies in economic loss. All three courts held that the admitted intention to mislead the authorities was sufficient.

As the Court of Criminal Appeal recognised,[3] Welham's argument that an intent to defraud entails an intent to cause economic loss is strongly supported by Mr. J. W. C. Turner in *Russell on Crime* [4] and by Dr. Glanville Williams in *Criminal Law: The General Part.*[5] Both writers deal in some detail with the often-cited dictum of Buckley J. in *Re London & Globe Finance Corpn., Ltd.*[6] which concludes with the statement that " to defraud is by deceit to induce a course of action." Both contend that this statement must be read in the light of the earlier statement that " To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury," and both conclude that " injury " here means economic loss. Without this qualification, they argue, the wide interpretation of defrauding as inducing any course of action would obliterate the distinction drawn by the Forgery Act between public and private documents, the former requiring an intent to deceive, the latter an intent to defraud. " Deceits are not practised," writes Dr. Williams, " except to induce a course of action or at least abstention from action. It is submitted that in ordinary language defrauding involves the idea of economic loss." [7]

The Court of Criminal Appeal had no doubt that both writers had taken " too narrow a view. . . . Provided that the intention is to cause the person deceived to act to his real detriment, it matters not that he suffers no economic loss. It is sufficient if the intention is to deprive him of a right or to induce him to do something contrary to what it would have been his duty to do, had he not been deceived." [8]

Whilst neither referred explicitly to " real detriment," both Lord Radcliffe and Lord Denning, who delivered the main speeches in the House of Lords, agreed that economic loss was not a requirement of defrauding.

[3] *R.* v. *Welham* [1960] 1 All E.R. 260 at p. 264.
[4] 11th ed., 1958, Vol. 2, at pp. 1428–1430.
[5] (1953) at pp. 76, 77.
[6] [1903] 1 Ch. at p. 732. The passage usually cited reads: " To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."
[7] *Loc. cit.* note 5 at p. 77.
[8] *Loc. cit.* note 3 at p. 264.

Lord Radcliffe, after considering a number of possible popular interpretations of defrauding, in fact flatly disagrees with Dr. Williams' " ordinary language " interpretation of the term. " There is nothing in any of this," he states, " that suggests that to defraud is, in ordinary speech, confined to the idea of depriving a man by deceit of some economic advantage or inflicting on him some economic loss." [9] Whilst establishing, like Lord Denning, that the older cases deny the need to prove economic loss, Lord Radcliffe's own definition of defrauding is extremely difficult to pinpoint. Agreeing that to defraud " must involve something more than the mere inducing of a course of action by deceit " and that Buckley J.'s later statement " must be understood in the light of what had gone before," Lord Radcliffe is far from explicit as to what thing more is involved than the mere inducing of a course of action by deceit. In a sentence which he apparently regards as crucial but which itself does not seem to follow on logically from the two preceding it, he comments that the significance of the later statement of Buckley J. " is to point the contrast between deceiving, the essence of which is to bring about a state of mind, and defrauding, the essence of which is to bring about a course of action whether doing something or refraining from doing something." [10] This, of course, is undeniable but it hardly indicates what, if any, additional element in defrauding is required over and above the inducing of any course of action.

At one stage in Lord Radcliffe's speech, one is inclined to feel that his decision turns on the public duty element in the case. " It is clear," he states, " that in connection with this offence, the intent to defraud existed when the false document was brought into existence for no other purpose than that of deceiving a person responsible for a public duty into doing something that he would not have done but for the deceit or not doing something that but for it he would have done." [11] Yet, at the conclusion of his speech, he seems to suggest that the only factors which prevent the inducing of any course of action by deceit from being to the " injury," " detriment " or " prejudice " of the actor, which he then recognises to be necessary, and thus from amounting to defrauding, are the operation of the *de minimis* rule and the fact that a jury might conclude " that there was no real intent to prejudice or injure." [12]

In short, it would appear that the true answer for Lord Radcliffe to some of the problems which can arise from this elastic interpretation of defrauding is that " theoretical arguments have to be tried by a certain standard of common sense." [13] Yet, however realistic may be this assessment of the role of the jury, standing

[9] *Loc. cit.* note 1 at p. 808.
[10] *Ibid.* at p. 810.
[11] *Ibid.* at p. 809.
[12] *Ibid.* at p. 810.
[13] *Ibid.*

between the harshness of the law and the accused, it may seem to some to leave, as the defence contended, " a dangerously wide definition of a crime." Admittedly, there is considerable force in his contention that " words, not being capable of infinite division for purposes of precise measurement, can only convey ideas that are to some extent general," [14] but it is surely one of the functions of the judiciary in defining a crime to try to dispel any generality of idea which may be open to abuse by prosecution or jury.[15] Inevitably, this wide interpretation of intent to defraud makes largely, though not entirely, meaningless the distinction in the Forgery Act between the treatment of public and private documents. As Lord Radcliffe admits, " it is difficult to imagine an instance of a man forging a document in order that it should be used as genuine without having, at the same time, an intention of affecting another's conduct to his prejudice." [16] There may be cases in which there is an intent to deceive and no more [17] but these must be extremely rare.

Lord Denning's speech makes even less reference to any qualifying requirement of " injury," " detriment " or " prejudice." Apparently intent on establishing that the cases and the older texts deny the need for proof of economic loss, he hardly hints at any qualification to be imposed on inducing any course of action by deceit. He makes what seems to be merely passing reference to the requirement of prejudice and clearly infers that this can be easily satisfied. " Put shortly," he states, " ' with intent to defraud ' means ' with intent to practise a fraud ' on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough." [18] The fact, in this instance, that the accused intended to mislead the Capital Issues Committee whereas the person who would have been deceived (or defrauded) was an Inspector from the Board of Trade, was clearly irrelevant.

However wide may be their interpretation of intent to defraud, both Lord Radcliffe and Lord Denning strongly reinforce the Court of Criminal Appeal's contention that the idea of economic loss is not supported by authority. Although some of the older cases they cite against the narrow Turner-Williams interpretation are not entirely conclusive [19] and one of the more recent cases [20] has been

14 *Ibid.*

15 The process adopted by Lord Radcliffe is somewhat reminiscent of that adopted by the Court of Criminal Appeal in *R.* v. *Spriggs* [1958] 1 Q.B. 270 which, in failing to assist in the interpretation of s. 2 of the Homicide Act, 1957, has been strongly criticised by many writers. In this connection, see now, however, *R.* v. *Byrne* [1960] 3 All E.R. 1.

16 *Loc. cit.* note 1 at p. 811.

17 See, *e.g.*, *R.* v. *Hodgson* (1856) Dears. & B. 3.

18 *Loc. cit.* note 1 at p. 815.

19 *R.* v. *Toshack* (1849) 4 Cox C.C. 38; *R.* v. *Hodgson*, *infra*. See, further, Fridman, *Intent to Defraud Reconsidered* [1960] Crim.L.R. 530.

20 *R.* v. *Bassey* (1931) 22 Cr.App.R. 160.

doubted, in this respect, by Lord Goddard,[21] their array of authority is fairly overwhelming. Whilst one may too easily accord exaggerated respect to the older writers, it is difficult to refute Kenny, Stephen, Blackstone and East, as well as a long line of cases.

S. Prevezer.

A Man of Bosham

The "Man of Bosham's Case," *Iveagh* v. *Martin*,[1] has provided one of many lighter features of recent months, though the work of judge and counsel during eight days was anything but light. The plaintiff is Lord of the Manor of Bosham and claimed payment from the defendant, a local yacht-repairer, for use of the plaintiff's moorings and quay. Paull J. held that the defendant was not exempt from such payments in the circumstances and it is difficult to quarrel with that ruling. Some of the reasoning, however, is less clear. The defendant's claim to an exemption was based on old charters referring to "men and tenants" of Bosham. The learned judge convincingly decided that "men" here had a special meaning, probably villein socmen because holding in ancient demesne (though some writers would treat privileged villenage as something distinct from tenure in ancient demesne or at least not confined to it). However, he proceeded to hold that any person holding a head lease from a freehold landowner who happened to be Lord of the Manor became a "man or tenant" because of the tenure created by the lease. It is very doubtful whether a mere lessee came within the terms of the medieval charters and authorities. Tenure cannot be created since 1290 and there was no evidence that the land leased by the defendant had enjoyed any privilege from toll.

The argument that any inhabitant was now a "man" of Bosham was rejected by the court, though there is considerable authority for such an interpretation in other cases. The savings clause in a 1938 statute which refers to birth or descent from birth in Bosham was also rejected as being no proof of what the original custom was.

Paull J. also held that the privilege from toll applied within the manor as well as outside it. He distinguished other authorities which pointed out that someone had to deal with local work like the repair of streets and walls, by stressing that Bosham was held in ancient demesne, but the reasoning here is not very clear. If such freedom from internal tolls existed when the King held the

[21] In the Court of Criminal Appeal in *R.* v. *Owen* (1956) 41 Cr.App.R. 11 at p. 15. However, on the hearing of the appeal in this case in the House of Lords, the correctness of the wider view, later upheld in *Welham*, was asserted by Lord Tucker, a member of the House of Lords in *Welham*.

[1] [1960] 3 W.L.R. 210; [1960] 2 All E.R. 668.

manor directly, tolls could not later be exacted, but what proof is there that no tolls were ever paid when it was in the King's hand?

The learned judge was clear in limiting the exemptions to use of the moorings and quay for embarking and disembarking and temporary mooring between tides, so that the defendant could in no circumstances carry on a business there scot-free. This is supported by the modern evidence as to the privileges actually enjoyed, and has the reasonable character typical of custom. However, his lordship seems to contradict his citation from Coke. Coke said that the original reason for exempting holders of ancient demesne land from toll, connected with provisioning the royal household, had gone, though the privileges remained. Hence it is rather strange to try to work out analogies based on supplying fish to the Crown in order to decide the true limits of a toll on seaside activities today.

Two interesting incidental points on custom were raised. The court accepted the fact that the moorings and quay went back to 1189 because they appeared on an old map (the date of which is not given) and the plaintiff could not prove that they did not exist until after 1189. It also rejected the suggestion that a wide class of inhabitants might enjoy the exemption, on the ground that that would contradict the established limited custom. Here it is certainly right that customs can never be contradictory.

On the question of interpretation it was held that the term " tenants " could not develop to include " inhabitants " because " inhabitants " had always existed and this seems to accord with the " *expressio unius exclusio alterius* " rule. Applying this to the defendant's lease it is certainly arguable, in support of the judge's reasoning, that leaseholders did not exist as any kind of landowners, in the time of Richard II, the date of the earliest exemption, whereas " freehold tenants " have now ceased to exist and been factually replaced by leaseholders, so that one type of landholding might be substituted for the other today.

It was also decided that the rights of the public to use quays or moorings along tidal navigable waters did not extend to the kind of use being made of them by the defendant.

Whereas the reasoning of this case is not completely convincing there seems no reason to disturb the result.

A. K. R. Kiralfy.

Problems Affecting the Exercise of an Option

It is not often that an attempt to exercise an option to renew a lease can raise so many basic problems of contract law as was the case in *Beesly* v. *Hallwood Estates, Ltd.*[1] The lease here was for a term of twenty-one years and contained an option to renew for a similar period provided that written notice was given at least six

[1] [1960] 1 W.L.R. 549; [1960] 2 All E.R. 314.

months prior to the termination of the original lease. The plaintiff, an assignee of the original tenant, gave the required notice exercising the option, and this was received by the defendant company which had in the meantime purchased the freehold reversion for money. On receiving this notice, the defendants indicated through their solicitors that they would be willing to grant a new lease on the terms set out in clause 5 of the original lease, subject to the plaintiff giving an undertaking that the whole of the exterior and interior of the premises would be redecorated within the following six months.

In the course of the correspondence which followed, the plaintiff requested that the period of the undertaking be extended to nine months, and the defendants replied that they were prepared to grant such an extension, but only in respect of the exterior decorations. At this point the defendant company proceeded to attach its seal to the new lease, while the plaintiff, on her part, executed the counterpart, though the two documents were never exchanged. Shortly afterwards it was reported at a board meeting of the defendant company that a new lease had been executed for the letting of the property to the plaintiff. At this time both the plaintiff and the directors believed that the option was valid, but, following a query raised by one of the directors at the board meeting, the company was advised that the option was void since it had never been registered as a land charge as required by section 10 (1) of the Land Charges Act, 1925. Thereupon the company advised the plaintiff that it was no longer willing to grant her the new lease.

In this situation, three possible lines of attack lay open to the plaintiff. First, she could contend that, irrespective of the validity of the option, the defendants were bound by the further lease sealed by them and could be compelled to hand it over to her on receiving the counterpart executed by herself. If this contention failed, she could argue that, despite the lack of registration, the option was valid and, as she had complied with the necessary formalities for exercising it, the company was bound to execute a further lease in her favour. Thirdly, she could assert in the alternative that, even if the option was void, the negotiations which had taken place between the company and herself constituted a new contract to grant her a lease by which the defendants were bound.

In the event she succeeded on the first ground, despite the fact that the trial judge, Buckley J., held that the option was void through lack of registration. In his view the defendants were bound by the new lease to which they had regularly attached their seal, providing the plaintiff handed over the executed counterpart. Contemporary conveyancing practice provides that, where a deed is to be executed in duplicate, execution of the deed by one of the parties raises the presumption that he executes it in escrow, conditionally upon the other party executing his part of the contract.

The problem in this case was whether an additional condition attached; namely, the giving of a suitable undertaking by the plaintiff in respect of the decorations. After due consideration of the surrounding circumstances, however, Buckley J. declined to hold that the directors of the company intended to attach this extra condition. On the one hand, the chairman of the board meeting, at which the query relating to the validity of the option had been raised, had nevertheless countersigned the company's seal, while the minute of the meeting recording the execution of the lease made no reference to any condition relating to decorations. Moreover this objective evidence of intention was strengthened by the fact that all the participants at the board meeting clearly considered themselves bound by the sealed lease.

The point was also raised that the lease had not been delivered in conformity with normal conveyancing practice, but Buckley J. was not of the opinion that this was fatal to the plaintiff's case. " The sealing of a deed by a corporate body, in my judgment, prima facie imports delivery of that deed, either unconditionally or conditionally; . . . and I see no reason, in the present case, to conclude that the sealing of the lease by the defendants did not import delivery so as to constitute due execution either unconditionally or in escrow." [2]

The plaintiff succeeded, therefore, on the bare fact that the lease had been duly executed. Her rights stemmed solely from the deed and not from any obligation arising from previous negotiation or the exercise of the option. Indeed it is clear from the remainder of the judgment of Buckley J. that, without the deed, the defendant would have had no contractual right to compel the defendants to grant her a new lease.

An attempt by the defendants to resist enforcement of the lease on the ground that it had been executed under a mutual mistake as to the plaintiff's rights under the option, was rejected by Buckley J. for the reason that such mistake was one of law and not of fact. In his view the mistake related to the legal effect of an unregistered option and, since the parties were in possession of all the facts, " The mistake was as to the nature and effect of the general law applicable to those known facts." [3] This is in line with the traditional view as expressed in such cases as *Holt* v. *Markham* [4] and *Ord* v. *Ord*,[5] but is a little difficult to reconcile with the decision in *Solle* v. *Butcher*,[6] where the majority of the Court of Appeal was prepared to hold that a mutual mistake as to whether a flat fell within the provisions of the Rent Restriction Acts was a question of fact. Moreover, Buckley J. expressed the view that such a mistake would not entitle the defendants to have

[2] *Ibid.* at p. 562.
[3] [1960] 1 W.L.R. at p. 560.
[4] [1923] 1 K.B. 504.
[5] [1923] 2 K.B. 432.
[6] [1950] 1 K.B. 671.

the lease rescinded, whereas in recent years equitable remedies have been granted without too rigid an adherence to the distinction between mistakes of law and fact. The distinction has never been clearly defined and, in the last resort, a great deal may turn on the interpretation applied to the facts of a particular case. Would it, for instance, have made any difference to the basic question of law or fact in the present case if both parties had been aware that an option to renew a lease was void if not registered, but had executed the lease in the mistaken belief that it had been registered? [7]

What now of the less successful alternative arguments put forward by the plaintiff and based on executory contractual rights? The trial judge had commenced his judgment by dealing with the contention that even if the lease had not been validly executed, the option had been duly exercised, thus entitling the plaintiff to the grant of a new lease. The vital question here was whether the option was valid in the absence of registration. There could be no doubt that if it was registrable under section 10 (1) of the Land Charges Act, 1925, then it was rendered void by section 13 (2) as against the defendant company, which had purchased the freehold reversion for money. Whether or not it was registrable depended on the construction to be applied to the wording of section 10 (1) which lists the type of charge covered by the Act. The relevant Class C (iv) expressly covers " Any contract by an estate owner . . . to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option of purchase, a right of pre-emption or any other like right (in this Act referred to as an ' estate contract ')." The main introductory limb of this section clearly contemplates some form of contract, albeit conditional, whereas Buckley J. was of the opinion that an option to renew a lease was not a contract but merely a standing offer capable of being converted into a contract by its exercise in the required form within the prescribed time limit. He based his decision on *Helby* v. *Matthews*,[8] which held that the presence of an option to purchase in a hire-purchase agreement does not render the hirer " a person having agreed to buy goods " within the meaning of the Factors Act, 1889, since he could not contractually be compelled to exercise the option and become a buyer of the goods. Similarly in the present case, there cannot be said to be even a conditional contract to renew the lease when the lessee is under no obligation to exercise the option.

Nevertheless section 10, Class C (iv) proceeds to define an " estate contract " as, *inter alia*, " including a contract conferring expressly or by necessary implication a valid option of purchase. . . ." If the argument that an option can never constitute

[7] It is not clear that the parties in the present case were aware of the lack of registration until after they had executed the lease.
[8] [1895] A.C. 471.

a contract is correct, there is clearly some discrepancy in the wording of this section. In order to overcome this difficulty and so give meaning to the provision, Buckley J. found himself compelled to deviate from the normal canons of construction by holding that the examples given in the second limb of the section must be treated as extending the normal definition of the term " contract " so as to include options. " In this context the word ' including ' must, as a matter of construction, be given the effect of ' which for this purpose shall be treated as including '." [9] Accordingly he reached the conclusion that the option in this case was registrable under section 10 (1) and thus rendered void as against the defendants when they purchased the reversion. Any claim by the plaintiff, therefore, based on the exercise of this option, must fail.

The final argument of the plaintiff involved the contention that, even though the option was void, the resulting correspondence between the parties should be treated as constituting a new contract to grant her the lease. For this argument to be successful, it would be necessary to hold either that the parties intended to create a new contract independent of the option, or that, in the absence of such an intention, a contract could arise from some mechanical operation of the rules of offer and acceptance. On the first point, the fact that the option might be void for lack of registration had clearly not been present in the mind of either party during the course of negotiations for renewal of the lease. Accordingly the trial judge took the view that, as these negotiations had been conducted with " the mutual intention of giving effect to what were believed to be the existing rights of the plaintiff," [10] they must be treated as abortive if it later transpired that the plaintiff had no existing rights owing to the invalidity of the option. Certainly they could not be construed as creating new contractual rights independent of the option, for neither party had intended their correspondence to have that effect. While it is true that the defendant company had expressed its willingness to grant a new lease on the terms contained in clause 5 of the original lease, it had done so with the intention of " carrying out what were thought to be existing obligations, not of creating any new obligation." [10] On the view that the option was a standing offer which was accepted by the giving of the required notice, both parties had considered themselves bound as from the time of the receipt of that notice by the defendants. Any subsequent expression of willingness to grant the required lease on the part of the defendant company was therefore intended as a recognition of existing rights and not made with the intention of creating new ones.

It was this fact which distinguished the present case from that of *British Homophone* v. *Kunz*,[11] where an option for renewal in a

[9] [1960] 1 W.L.R. at p. 557.
[10] *Ibid.* at p. 558.
[11] (1935) 152 L.T. 589.

contract of service was held void for uncertainty. Here again both parties thought the option valid, and consequently negotiated and completed a new formal written agreement for a further period of twelve months. Their mistake led to the belief that the exercise of the option created an obligation to enter into a new contract, not that it created the contract itself. Thus Kunz intended to enter into a new contract and was bound by it when completed, whereas the defendant company in the present case had no such intention.

The question still remains, however, whether it is true to state that no obligation can result even though the lessor, by his conduct, continues to give the impression that he regards himself as bound by the apparent " acceptance " of the void option. Even if it were possible to construe an intention to create a new contract from the conduct of the parties, Buckley J. was of the opinion that the plaintiff's claim would still fail. For such a contract to result, it would be necessary to treat the plaintiff's notice exercising the option as the offer, but in this event the ensuing correspondence on the subject of the undertaking relating to the decorations amounted to a series of counter-offers, none of which was finally accepted. Even the final sealing of the lease by the defendant company was insufficient for this purpose, since it is axiomatic that an acceptance is never valid until it has been communicated to the offeror.

Nor did the trial judge consider that the plaintiff would be any more successful by invoking the principle of promissory estoppel as outlined in the cases of *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*[12] and *Combe* v. *Combe.*[13] In his view the plaintiff had no existing legal rights except for any which might have arisen by an application of the estoppel, and it is now well settled that the doctrine cannot be invoked to create a cause of action or to negative the operation of a statute. Exception cannot be taken to this ruling on the facts of the present case, but it is interesting to note that Buckley J. apparently regards some form of detriment to the plaintiff as an essential requirement of this form of estoppel. He points out that even though the conduct of the defendants may have induced her to believe that they would grant the further lease, and not rely upon section 13 of the Land Charges Act, the plaintiff had not in any way changed her position to her detriment by acting on the faith of this representation. There was no evidence that she had paid rent after the end of the original term, nor had she suffered by refraining to take steps to enforce clause 5 of the lease against the original lessors, since such action would not have been open to her. This requirement of detriment was not present in the doctrine as defined by Denning

[12] [1947] K.B. 130.
[13] [1951] 2 K.B. 215.

L.J. (as he then was) in *Combe* v. *Combe*,[14] but it is an essential ingredient in its American counterpart,[15] and is apparently beginning to find favour amongst British judges.[16]

J. F. Wilson.

Payment by Letter of Credit

The judgment in the recently reported Australian case of *Saffron* v. *Société Minière Cafrika* [1] suggests answers to a question which is, with the growing use of commercial credits in the export trade, increasingly likely to be of practical importance, namely, whether in any circumstances a stipulation for payment by bankers' credit debars a seller who is not in fact paid through the credit from suing the buyer for the price.

The essential facts of the case were that a seller contracted to sell chrome ore and stipulated for payment by means of what was assumed between the parties to be an irrevocable but not a confirmed credit. The seller delivered the goods to the buyer but payment was not met out of the credit because the bank found the documents presented to it were not in order. The seller thereupon sued the buyer for the price but the buyer contended that the stipulation as to a bankers' credit was to be regarded as specifying an exclusive method of payment and that therefore upon its failure it was not open to the seller to sue the buyer on the contract of sale.

In delivering the judgment of the High Court of Australia upon this point, Dixon C.J. referred [2] to Professor A. G. Davis' monograph on *The Law Relating to Commercial Letters of Credit* [3] where, said the Chief Justice, the question was discussed and such authority as there was cited. The conclusion drawn by Professor Davis was that though dicta favoured the view that normally a seller did not take a draft drawn under a letter of credit in absolute but only in conditional payment the question could not be regarded as definitely settled until it was raised in an action between buyer and seller. Dixon C.J. went on to point out that the question could only arise in special circumstances as where the bank responsible for the credit went insolvent (a case suggested by Prof. Davis) or, as in the instant case, when the documents tendered were not in conformity with the letter of credit but the buyer had obtained possession of the goods.

Dixon C.J. then proceeded to explore the problem by distinguishing between various types of credits, thereby advancing

14 [1951] 2 K.B. at p. 220.
15 See s. 90 of the Restatement of the Law of Contract.
16 See, *e.g.*, Viscount Simonds in *Tool Metal Manufacturing Co., Ltd.* v. *Tungsten Electric Co., Ltd.* [1955] 2 All E.R. at p. 660.
1 (1958–59) 100 C.L.R. 231.
2 (1958–59) 100 C.L.R. at p. 243.
3 2nd ed., 1954, at p. 45. (The Report is in error in giving the reference to relevant passage in Prof. Davis' work as p. 42.)

somewhat beyond Professor Davis' treatment of the matter.[4] First the Chief Justice said that a provision for payment by a revocable credit [5]

> " could hardly be regarded in any circumstances as negativing payment in the event of revocation."

At the other end of the scale he thought [6] that a provision for an irrevocable and confirmed letter of credit [7]

> " might perhaps not unreasonably be regarded as a stipulation for the liability of the confirming bank in place of that of the buyer."

As for irrevocable but unconfirmed credits he thought that there would be less reason than in the previous case for regarding the provision of the credit as being all that is required of the buyer in any circumstances. He concluded these observations by saying that the instant case did not require the determination of the general question propounded by Professor Davis but despite these cautionary words the suggested answers to the problem seem, with respect, so eminently fitted to the three types of credit that in any future discussion of the problem they will have to be treated as of the greatest persuasive force.

He then went on to say that in the circumstances of the case before the court, involving as it did an irrevocable but unconfirmed credit, it was not reasonable to suppose it to be intended that if the buyer obtained the chrome but payment from the credit was refused, the seller was to go unpaid. He also approved the analogy drawn by Professor Davis and accepted by the trial judge, Kinsella J., between payment by negotiable instrument and payment by letter of credit. Just as an intent to make absolute payment by negotiable instrument must be strictly proved [8] and will not be deduced from ambiguous expressions such as " in payment," so in the case of the present credit intent that it was to amount to absolute payment should have been strictly proved and this burden had not been discharged.

The case thus seems to provide a useful addition to the still rather scanty case law on credits and as such will doubtless carry great weight if and when its problems come before the courts of

4 (1958–59) 100 C.L.R. at p. 243. But see now [1959] J.B.L. 323–6.

5 *Ibid.*

6 *Ibid.* at p. 244.

7 He adopted the definition of a confirmed and irrevocable credit given in Gutteridge and Megrah, *The Law of Bankers' Commercial Credits* (2nd ed., 1955), p. 13, " an absolute undertaking by a banker to honour all drafts complying with the terms of the instrument creating the credit, subject only to limitations as to the amount and period of time for which it is to be available." This work appears to take the view that payment by credit never releases the buyer. See p. 20, n. (q). So also the author of a comment in (1926) 40 Harvard L.R. 294. Prof. Davis appears to take this view at p. 63 for he lists the releasing of the buyer amongst objections to the adoption of the novation theory as a juridical basis for bankers' credits.

8 Prof. Davis cites *Maillard* v. *Duke of Argyll* (1843) 6 M. & G. 40.

this country. It might also be incidentally remarked that the case is an illustration of the dangers inherent in departing from the " classic " form of f.o.b. contract where the seller both puts the goods aboard and procures a bill of lading. Dixon C.J. alluded [9] to the well-known words of Devlin J. in *Pyrene* v. *Scindia* [10] on the modern flexibility of f.o.b. contracts and said that the present case was an illustration of this in that the seller discharged its duty by putting the chrome on board ship and allowing the buyer by means of the possession of a weight certificate [11] to obtain whatever bill of lading he wanted. Of this the Chief Justice said [12]:

> " It is true that the course which the seller adopted was, as the events show, an improvident one. It put the buyer in a position to procure a bill of lading which would give him control of the goods and yet would not comply with the terms of the letter of credit, so that the seller unnecessarily lost all control of the goods without payment or assurance of payment."

A. H. Hudson.

Careless Homework and Caveat Vendor in the Law of Contract

Professor Corbin states in his treatise on *Contracts* [1]:

> " There are many cases in which one party has assented to a definite bargain because of some antecedent error of computation that he has made. Their number is due to the fact that men are poor accountants and inaccurate in doing simple mathematical problems. If the mistake is discovered and corrected by notice before an acceptance of the mistaken offer, no harm results and no relief is necessary. But if an acceptance has taken place, trouble may arise. If the error was made by the offeror, then the offer is one that would not have been made but for the mistake. This is the frequently occurring case."

Such was the case in *Imperial Glass, Ltd.* v. *Consolidated Supplies, Ltd.*,[2] in which the British Columbia Court of Appeal overruled the trial judge who had ordered rescission of a contract for unilateral mistake.

In October 1957 the appellant, suppliers and installers of window-glass, was invited by a sub-contractor on the construction of a school to bid on the supplying and installation of window-glass. Before submitting a bid the appellant telephoned the office of the respondent and requested a quotation on " Twin-Seal " glass. The

9 (1958–59) 100 C.L.R. at p. 241.
10 [1954] 2 Q.B. 402 at p. 424.
11 This document was the equivalent of a mate's receipt.
12 (1958–59) 100 C.L.R. at pp. 241–242.
1 1951, Vol. 3, para. 609 at p. 435.
2 (1960) 22 D.L.R. (2d) 759 (Bird, Coady and Sheppard JJ.A.).

appellant gave the approximate sizes and number of units of each size and the weight of glass in the respective units. This information was noted down by Mrs. L, an employee of the respondent, who took the message. Mrs. L then calculated the number of square feet per unit size and then instructed another employee, Mrs. S, to multiply footage per unit by the number of units and thereby determine the total footage. In doing so Mrs. S arrived at a total footage of 202.62 sq. ft. instead of 2026.24 sq. ft. Later in the day an officer of the respondent, relying on the correctness of the computation by Mrs. S, quoted to the appellant by telephone a price of $2,000.00. The appellant then submitted a bid to the contractor, using the figure of $2,000.00 in its calculation, and on November 6 the appellant's tender was accepted. Between this date and December 11 the appellant telephoned once or twice to the respondent asking for written confirmation of the respondent's verbal quotation given in October. The respondent's reply was that no confirmation was necessary and that the appellant, if interested, should place his order.

About December 11, the appellant obtained a quotation of $5,400.00 from another supplier of glass, a competitor of the respondent, and thereupon went immediately to the office of the respondent and, without disclosing this new quotation, obtained written confirmation of the respondent's October quotation of $2,000.00. This written confirmation referred, *inter alia*, to the " sizes supplied by you," meaning the sizes supplied in the telephone conversation in October.

On December 13 the appellant, by letter, placed its order with the respondent for the glass to be supplied pursuant to the letter of December 11. On December 17, the respondent discovered the mistake made in the calculation of the footage and therefore in the price quoted and informed the appellant by telephone that a mistake had been made. Later, by letter dated December 23, the respondent wrote to the appellant repudiating the contract by refusing to deliver the glass at the price quoted.

The appellant, being obliged to carry out its contract with the school sub-contractor, had to purchase the required glass, apparently from the respondent, at a cost of $4,612.00. The appellant's action was, therefore, to recover the sum of $2,612.00 being the difference between the actual price and the quoted price based on the miscalculation.

The first point of argument, which occupied a major portion of the attention of both counsel and the bench, was whether a contract was concluded between the parties in October when the appellant submitted a bid to the sub-contractor based on the respondent's miscalculated quotation, or in December when the appellant obtained and accepted the respondent's written quotation. The trial judge, Ruttan J., with whom the Court of Appeal agreed, held on three grounds that the contract came into existence

in December upon the exchange of letters. First, in the circumstances the oral quotation did not amount to an offer since there was no notification to the offeror that the quotation was sought not as a mere indication of price, or casual inquiry, but with the intention of creating a firm legal relationship. Secondly, the appellant's conduct in requesting written confirmation of the oral quotation indicated that the appellant did not consider any contract to have been concluded and this inference was strengthened by the fact that the appellant subsequently gave a written order forty-eight hours after receipt of written confirmation of the quotation from the respondent in the December. Thirdly, assuming the oral quotation was an offer there was evidence neither of an understanding between the parties nor of a custom in the trade from which it could be inferred that such an oral quotation could be accepted by the act of entering into a legal relationship with a third party. Hence authorities such as *Central London Property Trust, Ltd.* v. *High Trees House, Ltd.*[3] and *Carlill* v. *Carbolic Smoke Ball Co.*[4] were inapplicable. Although it might be questioned whether the mere setting down of an oral quotation in writing converts that quotation into an offer, the argument was not apparently advanced in either court. Accordingly the case was developed on the basis that the exchange of letters in December constituted a contract between the parties.

The issues were thus now narrowed down to the effect of the mistake on the part of the respondent and the effect of the appellant's knowledge of that mistake. The trial judge held that although the mistake was unilateral on the part of the respondent, and was not a mistake of substance, the case was one where equity would have granted a decree of rescission of the contract. He referred to Lord Denning's remarks in *Solle* v. *Butcher* [5] to the effect that a contract would be set aside " if the mistake of the one party has been induced by a material misrepresentation of the other. . . ." From his findings of fact he concluded that the plaintiff on December 11,

> " was inviting a written offer which the plaintiff knew was based on an error in the offeror's mind. Certainly therefore the plaintiff was contributing to the mistake. He was in fact urging the defendant to conclude a contract while allowing him to remain under his delusion."

Finally he stated that the defendant had pleaded that,

> " the plaintiff was well aware of the mistake and with intent to take unfair advantage requested confirmation of the said oral quotation. If this be not a plea of fraud, it is at least one of conduct amounting to fraud, and it is entirely borne out by the evidence."

[3] [1947] K.B. 130.
[4] [1892] 2 Q.B. 484.
[5] [1950] 1 K.B. 671 at p. 692.

Ruttan J. therefore granted rescission of the contract to the defendant with costs. The Court of Appeal accepted Ruttan J.'s finding that the appellant in accepting on December 13 the offer of the respondent made on December 11, did so with full knowledge that a mistake had been made by the respondent in the offer submitted, but refused to conclude from this finding that the appellant's failure to make known to the respondent that it had made a mistake was conduct amounting to fraud which justified rescinding the contract and dismissal of the appellant's claim for damages. *Solle* v. *Butcher* was distinguishable on the ground that it was concerned with mutual mistake and the court granted rescission but on terms that would be fair to both parties. Other cases of mistaken quotations such as *Hartog* v. *Colin and Shields* [6] were distinguishable in that the mistake occurred in the words of the offer and such mistake, being known to the other party, prevented a consensus.

The Court of Appeal regarded the instant case as governed by *Bell* v. *Lever Bros., Ltd.*,[7] where it was held, *inter alia*, that there was no duty on the defendants to disclose information to the plaintiffs which would have led the plaintiffs not to enter into compensation agreements. If fraud could not be inferred in the *Bell* case it should not be inferred on the facts of the instant case since the only evidence from which such inference could be drawn was the failure of the appellant to disclose the mistake of the respondent before entering into the contract. Two factors were in favour of the appellant's position. First, he had already committed himself to the sub-contractor, relying in good faith on the quotation given and which the respondent must have known would be used by the appellant in tendering on some contract. Admittedly no binding contract had been made with the respondent at that time but having contracted with the sub-contractor it was not fraud on his part to enter into the written contract with the respondent without disclosing the error. Secondly, the respondent's error was not induced by any representation, fraudulent or otherwise, of the appellant.

In summary, the Court of Appeal, in the circumstances of the case would not hold

> " that the conduct of the appellant, which may be open to question on moral and ethical grounds, amounted to fraud. While the appellant knew of the mistake, it was not a mistake induced by any representation made by the appellant. It was a mistake of the respondent arising from its own negligence or carelessness. The respondent cannot be relieved from the consequence of that mistake, the contract is not voidable and the appellant is entitled to damages."

In *Tamplin* v. *James*,[8] James L.J. stated that " a person (must

[6] [1939] 3 All E.R. 566.
[7] [1932] A.C. 161.
[8] (1880) 15 Ch.D. 215 at 221.

not) snap at an offer which he must have perfectly well known to be made by mistake. . . ." The qualification which seems justified by the decision in *Imperial Glass* would seem to be " but a person who has changed his position relying on a mistaken quotation may snap up a subsequent offer based on the mistaken quotation even though he knows or has good reason to suspect that a mistake has been made."

The decision attempts to strike a balance between two parties who each contributed to the events which resulted in the damage complained of by the one. It is commercially reasonable and the common practice to rely on quotations given by reputable firms in estimating and bidding on contracts. Had a contract with the respondent supplier never been made, either because the mistake was discovered before the written offer was communicated, or, for example, because of the supervening bankruptcy of the respondent, the loss arising out of his contractual obligation to the school sub-contractor would have rested on the appellant. He would have had no action in contract or in tort against the respondent.[9]

On the other hand it is also common commercial practice to question a quotation which seems unduly out of line with quotations received from other suppliers, though not usually disclosing the details of those other quotations. To reach a decision wholly in favour of either party could not fail to impose an unjust burden on the losing side, and one which is " open to question on moral and ethical grounds."

ERIC C. E. TODD.

AGENT OF A FOREIGN PRINCIPAL

THE majority of recent textbooks which treat of agency topics either doubt [1] or deny [2] the continued existence of the once well-established presumption that an agent acting for a foreign principal assumed a personal liability. This seems to lend a special interest to some remarks of Pilcher J. in the recent case of *Cox* (*trading as Port of Richborough*) v. *Sorrell*.[3] The facts in outline were that the plaintiff sued the defendant for loading charges in respect of cattle exported by the defendant through the Port of Richborough. The learned judge found that the defendant had in fact agreed to pay these charges and in consequence gave judgment for the plaintiff. In two of the three transactions which were the subject

[9] In *Gillis Supply Co.* v. *Chicago, Milwaukee and Puget Sound R.W. Co.* (1911) 18 W.L.R. 335 the British Columbia Court of Appeal denied an action to recover damages caused to the plaintiff who bought goods relying on an incorrect quotation by the defendants of freight rates, the error having been made by mistake and not deliberately and recklessly.

[1] See Bowstead, *Agency*, 12th ed., p. 201; Anson, *Contract*, 21st ed., p. 518.

[2] See Powell, *Agency*, p. 207; Fridman, *Agency*, p. 173; Hanbury, *Agency*, p. 164; Cheshire & Fifoot, *Contract*, 5th ed., p. 399; Chitty, *Contracts*, 21st ed., Vol. 2, pp. 56 and 60; Scrutton, *Charterparties*, 16th ed., pp. 39–40.

[3] [1960] 1 Lloyd's Rep. 471.

matter of the proceedings before the court the defendant had been acting as an agent for foreign principals, in the one case Dutch, in the other Italian. On this aspect of the case Pilcher J. made the following observations, apparently as providing an additional or alternative ground for his conclusions [4]:

> "I was referred to passages in the third edition of Lord Halsbury's *Laws of England*, Vol. I, p. 230, para. 518, which deals with the situation of agents for foreign principals. In this case Mr. Sorrell was an agent for a foreign principal, but I am not going to read the passage out because it sets out in my view correctly, the effect of the decisions and I think that a great deal more is required than was ever done by Mr. Sorrell in this case, when acting for a foreign agent ([*sic*], read 'principal') before the agent can escape personal liability for acts which he does on behalf of his foreign principal."

The passage in *Halsbury* which thus receives judicial approval reads as follows:

> "In particular when an agent makes a contract on behalf of a foreign principal, there is a presumption based on the custom of merchants that the agent has no authority to pledge the credit of the foreign principal so as to establish privity of contract between the foreign principal and the third party, and that the agent, although he discloses the name of the principal, contracts personally, unless a contrary intention appears from the contract itself or from the attendant circumstances. But where the foreign principal is brought into privity of contract the presumption does not operate so as to render the agent liable as well as the principal."

It will be recalled that in *Rusholme & Bolton & Roberts Hadfield* v. *S. G. Read*,[5] a case concerning the liability of a confirming house in the export trade, Pearce J. (as he then was) expressed the opinion that the presumption had not lost all its force, and in particular he pointed out that the case of *Miller, Gibb* v. *Smith & Tyrer*,[6] which seems to be taken by some writers [7] as marking the demise of the presumption could be countered by *Brandt* v. *Morris*,[8] decided in the Court of Appeal later in the same year.

Recent academic opinion in the same sense is to be found in Professor Wortley's review [9] of the latest edition of Dicey's *Conflict of Laws* where Bowstead's [10] former treatment of this topic is adopted and mention is made of Continental practice which resembles the presumption.

The result seems to be that some text writers, no less than some judges,[11] have been somewhat premature in asserting that the presumption no longer carries any weight.

[4] *Ibid.* at p. 478.
[5] [1955] 1 W.L.R. 146 at p. 150.
[6] [1917] 2 K.B. 141.
[7] *e.g.*, Cheshire & Fifoot, *Contract*, 5th ed., 399.
[8] [1917] 2 K.B. 784.
[9] 5 J.S.P.T.L.(N.S.) at p. 151.
[10] *Agency*, 11th ed., Art. 92, p. 195.
[11] Pritchard J. in *Holt & Moseley* v. *Cunningham* (1949) 83 Ll.L.R. 141.

The present writer has elsewhere [12] pointed out that no one has gone so far as to suggest that this presumption of personal liability is as remote from reality as some other old presumptions which may or may not continue to exist, such as the presumption of general hiring. It was also pointed out that the modern development of confirmation in export transactions [13] tends to produce a scheme of rights and duties similar to that produced by the presumption of personal liability which would seem to indicate that the needs and usages which produced the presumption have not ceased to operate. Indeed *Cox* v. *Sorrell* itself provides a neat illustration of the sort of difficulty which must have been envisaged by those who fostered the presumption. In the two transactions in which the defendant was acting as an agent for foreign principals the plaintiff, perhaps ill-advisedly as Pilcher J. pointed out,[14] applied to the foreign principals for payment but received no satisfaction whatsoever. In fact the plaintiff's letter to the Italian principal, one Luigi Borghi, was speedily returned with a note to the effect that " no such person, place or address was known in Milan." [15]

It may, of course, be urged by those who are critical of the older cases that a presumption which operated to add an alternative liability in the agent, in the nature of a guarantee to an existing liability in the foreign principal, would be more serviceable than the present presumption, which, by operating to deny an authority in the agent to create privity of contract between his principal and the third party,[16] prevents the principal falling under any direct liability to the third party. Since, however, the presumption is one of fact, even though at one period it was so strong as almost to be one of law,[17] there seems to be no insuperable obstacle to its being so moulded as to produce just and realistic solutions in accordance with whatever modern usage may be proved to the court.

A. H. Hudson.

When is a Conviction not a Conviction?

The case of *R.* v. *Governor of Brixton Prison, ex p. Caborn-Waterfield* [1] was an application for a warrant of habeas corpus that was " entirely devoid of merit." In 1955, the applicant was

12 35 Can.B.R. 336.
13 See also Schmitthoff [1957] J.B.L. 17 at p. 21.
14 [1960] 1 Lloyd's Rep. at p. 478.
15 *Ibid.* at p. 477.
16 See Halsbury, *Laws of England*, 3rd ed., Vol. I, p. 230; Anson, *Contract*, 21st ed., p. 518; *Miller, Gibb* v. *Smith & Tyrer* [1917] 2 K.B. at p. 150, *per* Swinfen Eady L.J.; at pp. 154–155, *per* Bankes L.J.; and p. 160, *per* Bray J. *Contra, semble*, Powell, *Agency*, p. 208n. " It is unlikely that a mercantile usage excluding the foreign principal's liability was ever recognised."
17 See *per* Blackburn J. in *Armstrong* v. *Stokes* (1872) L.R. 7 Q.B. 598 at p. 605.
1 [1960] 2 W.L.R. 792. Also reported at [1960] 2 All E.R. 178.

summoned to appear before a French court on a charge of having stolen about 23,000,000 French francs and 7,000 U.S. dollars. He did not appear at the hearing and the trial was consequently adjourned. He did not appear at the adjourned trial and, in 1956, he was convicted in his absence by a *jugement par défaut* and sentenced to four years' imprisonment.

Under French law the applicant at any time could move to have this judgment and sentence set aside and submit to a retrial. The applicant did so move but failed to attend the court for the retrial. In consequence the conviction and sentence were confirmed by a *jugement itératif défaut*, which not being appealed against within ten days became final and conclusive.

In 1960, the French Government requested the applicant's arrest and extradition and the warrant issued under the Extradition Act, 1870, stated that requisition had been made by the French Government for his surrender as one " accused of the commission of the crime of larceny." The Bow Street magistrate committed the applicant for extradition and he thereupon applied for a writ of habeas corpus.

One of the arguments advanced by the applicant was that he was being proceeded against as a " person accused " whereas he was actually a " person convicted." This would have been a clear defence had it not been for the wording of section 26 of the Extradition Act, 1870, which states that: " The terms ' conviction ' and ' convicted ' do not include or refer to a conviction which under foreign law is a conviction for contumacy, but the term ' accused person ' includes a person so convicted for contumacy."

The effect of this section is that if the applicant had been convicted for contumacy he would have been an accused person within the meaning of the act, and the warrant would have been good: if, however, he had been convicted for other than contumacy he was a convicted person and the warrant was bad.

In *Re Coppin* [2] the then Lord Chancellor held that the expression in section 26 " convicted for contumacy " was " intended as a translation of the French words ' *par contumace* '." By French law, if a person, who has been convicted " *par contumace* " subsequently surrenders himself to the court, the conviction becomes annulled and he undergoes his trial as if he had never been so convicted. This, as has been stated above, was the position of the appellant following his *jugement par défaut* in 1956.

However, after the subsequent *jugement itératif défaut*, the applicant could no longer obtain a retrial upon surrender but would be sent straight to prison. The *jugement itératif défaut* was, thus, different in kind from a conviction *par contumace* which could be set aside and was, therefore, not included within the term conviction *par contumace*, nor in the English translation of it given in section 26 of the Extradition Act.

[2] (1866) 2 Ch.App.Cas. 47.

The legal position was, therefore, that the appellant following the *jugement par défaut* was an accused person within the meaning of the Act, but following the *jugement itératif défaut* he became a convicted person and he had thus been wrongly proceeded against in the extradition proceedings when he was referred to as " an accused person " and he was, therefore, awarded his writ of habeas corpus.

D. G. Valentine.

Jurisdictional Problems in Nullity

The recent decision of Karminski J. in *Ross-Smith (orse. Radford)* v. *Ross-Smith* [1] seems to have put the problem of jurisdiction in nullity suits in voidable marriages back into the melting pot. The question at issue was whether, in a case where a petition of nullity is raised on the ground of wilful refusal to consummate or alternatively on the ground of incapacity, jurisdiction might be assumed by an English court solely on the ground that the marriage was celebrated in England. At the time of the petition the parties were domiciled in Scotland, the petitioner was living in England and her husband in Kuwait. Karminski J. held that although the court of the *lex loci celebrationis* would have jurisdiction to entertain the suit were it based on any cause which would render the marriage void *ab initio* that court would not have jurisdiction in cases of voidable marriages without some further connecting factor such as the domicile of the parties or the residence of the defendant.

The assumption of jurisdiction by English courts in matrimonial causes depends upon the nature of the cause. In some cases the court is simply being asked to declare an existing status, as in cases of void marriages where the court's function is simply to declare that the status of the parties has not been changed by their marriage ceremony. In these cases the English courts have assumed jurisdiction on a very wide variety of connecting factors including the fact that the marriage was celebrated in England. There are a number of cases supporting this proposition [2] and their rationale appears to be that " by professing to enter into a contract in England [the parties] mutually gave each other the right to have the force and effect of that contract determined by an English tribunal." [3]

A petition for annulment of a voidable marriage, except in cases of wilful refusal to consummate, involves a question of capacity to contract at the time of the marriage and is very different from a petition for divorce on the grounds of, say, cruelty or adultery,

[1] [1960] 3 W.L.R. 753; [1960] 3 All E.R. 70.
[2] *e.g.*, *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. 67; *Sottomayer* v. *De Barros* (1877) 3 P.D. 1 (C.A.); *Linke* v. *Van Aerde* (1894) 10 T.L.R. 426; see also *Hill (orse Petchey)* v. *Hill* [1960] P. 130 at p. 133 *et seq.* and Dicey's *Conflict of Laws*, 7th ed., p. 355, note 46.
[3] Sir Cresswell Cresswell in *Simonin* v. *Mallac* (1860) 2 Sw. & Tr. at p. 75.

which are essentially matters subsequent to the marriage contract and in no way connected with it. Nevertheless in *Inverclyde* v. *Inverclyde* [4] Bateson J. came down wholly for the view that nullity on the ground of impotence is a suit to avoid an existing marriage and as such affects the status of the parties as much as a divorce decree. Because of this he held that the court of the domicile of the parties is the only one competent to grant a decree of nullity in cases of voidable marriages.

Inverclyde v. *Inverclyde* was followed on this point by the Court of Appeal in *Casey* v. *Casey*,[5] to the extent that they held that celebration of the marriage in England does not in itself confer jurisdiction on an English court. It may be worth bearing in mind that in *Casey* v. *Casey* the petitioner alleged wilful refusal to consummate; this differs from the other grounds for nullity in that it is not an incapacity present at the time of the marriage, but rather like cruelty or adultery arises as a result of a party's reactions after the ceremony.

Before *Casey* v. *Casey* there is to be found a certain amount of authority rejecting the view of Bateson J. in *Inverclyde* v. *Inverclyde*. In 1944 two cases, *Easterbrook* v. *Easterbrook* [6] and *Hutter* v. *Hutter*,[7] both rejected the view that only the court of the domicile could assume jurisdiction over these cases. In *Easterbrook* v. *Easterbrook* the court assumed jurisdiction on the grounds of residence, domicile of one of the parties,[8] and because the marriage was celebrated in England. In *Hutter* v. *Hutter* jurisdiction was assumed on the ground that both parties were resident here in England.[9] This view that residence of both parties in England was sufficient to ground jurisdiction received the approval of the Court of Appeal in *Ramsay-Fairfax* v. *Ramsay-Fairfax* [10] and that case must be taken to have overruled *Inverclyde* v. *Inverclyde*. The reasoning of the Court of Appeal was that the ecclesiastical courts entertained suits of nullity in cases where the marriage was voidable and where both parties were resident within their jurisdiction, and the jurisdiction of the High Court under section 22 of the Matrimonial Causes Act, 1857, and section 32 of the Supreme Court of Judicature (Consolidation) Act, 1925, is " as nearly as may be conformable to the principles and rules of the court which previously exercised the jurisdiction."

Casey v. *Casey* is still Court of Appeal authority for the view

[4] [1931] P. 29.
[5] [1949] P. 420.
[6] [1944] P. 10.
[7] [1944] P. 95
[8] It might perhaps seem peculiar that a voidable marriage should allow the parties separate domiciles. All that can be said of *Easterbrook* v. *Easterbrook* is that it was undefended and very briefly reported. Certainly the case cannot stand by *De Reneville* v. *De Reneville* [1948] P. 100 on this point.
[9] See also *Robert* v. *Robert* [1947] P. 164, which was overruled by *De Reneville* v. *De Reneville* [1948] P. 100.
[10] [1956] P. 115.

that English courts cannot assume jurisdiction merely because the marriage was celebrated in England, but the decision is not as strong as appears at first sight. In a Northern Ireland suit, *Addison* v. *Addison*,[11] Lord MacDermott refused to follow it on the grounds that there was no justification for " splitting the nullity jurisdiction as between void and voidable marriages." [12] Furthermore in so far as *Ramsay-Fairfax* v. *Ramsay-Fairfax* overrules *Inverclyde* v. *Inverclyde* it impliedly overrules the reasoning of Bucknill L.J. in *Casey* v. *Casey* which was based " partly on the balance of hardship to the parties, but mainly on the analogy of the rule that the court of the domicile of the husband is the sole court with jurisdiction to dissolve a marriage." [13]

In *Hill* (*orse. Petchey*) v. *Hill* [14] Collingwood J. had to consider whether English courts could found jurisdiction on the ground that a marriage was celebrated in England. The suit was for a nullity decree on the ground of the husband's impotence. It was perhaps unfortunate that the Queen's Proctor who was called to argue the case supported the view of the petitioner's counsel that jurisdiction could be assumed in such a case. This meant that no proper argument was presented for the contrary view—though it might equally be said that since both counsel agreed it emphasises the fact the jurisdiction was rightly assumed.

Collingwood J. seemed inclined to equate the grounds for a voidable marriage with the principles upon which a marriage might be held void. He noted that this might not be true of wilful refusal to consummate but it was certainly true of the other grounds. He reasoned that the jurisdiction of the High Court was based on that of the old ecclesiastical courts and although those courts do not appear to have assumed jurisdiction as courts of the *lex loci celebrationis* such jurisdiction was assumed in *Simonin* v. *Mallac* [15] shortly after the Matrimonial Causes Act came into effect. Further to this the ecclesiastical courts appear to have made no distinction between void and voidable marriages. Finally he noted that there is no authority prior to *Inverclyde* v. *Inverclyde* wherein suits for annulling voidable marriages have been viewed as being concerned with changing status. In any case even if there were substantial authority for the decision in *Inverclyde* v. *Inverclyde* that case was overruled by *Ramsay-Fairfax* v. *Ramsay-Fairfax*.

Collingwood J.'s view of *Casey* v. *Casey* was that it was confined to its own peculiar facts. In his judgment in that case Bucknill L.J. confined himself to cases of wilful refusal to consummate and the headnote is too wide in so far as it suggests by the insertion of

11 [1955] N.Ir. 1.
12 *Ibid.* at p. 30.
13 [1949] P. 420 at p. 431, *per* Bucknill L.J. with whom Cohen L.J. concurred. *Cf.* Somervell L.J. at p. 432.
14 [1960] P. 130. For further comment see Milner (1960) 23 M.L.R., p. 184, and Webb (1960) 9 I.C.L.Q. p. 129.
15 *Supra*, note 3.

the letters "*e.g.*" before the words "wilful refusal" that Bucknill L.J.'s words have reference to all cases of voidable marriages. Collingwood J. went on:

> "In a case of wilful refusal a valid marriage is a condition precedent to the cause of complaint—the duty to consummate depends on the existence of a valid marriage. Where, however, as in the present case, the ground of the petition is impotence, the cause of the complaint is that the respondent was, at the time of the ceremony and has ever since been incapable of consummating it. . . . The general proposition that apart from any other consideration the court has jurisdiction because the marriage was celebrated in England (a proposition accepted by Lord MacDermott in *Addison* v. *Addison* regarding a marriage in Northern Ireland) is limited, so far as this court is concerned, by the decision in *Casey* v. *Casey*. That is to say, it does not apply where the cause is wilful refusal to consummate. But so far as the fundamentally different cause of impotence is concerned, there is nothing in the authorities which precludes the court from assuming jurisdiction where the marriage was celebrated in this country. I therefore hold that the court has jurisdiction and grant a decree accordingly." [16]

In *Ross-Smith* v. *Ross-Smith*, Karminski J. has taken the opposite view. It will be remembered that here the decree was asked for on the alternative grounds of the husband's wilful refusal or incapacity to consummate the marriage. On the one hand Karminski J. had the authority of *Addison* v. *Addison* and *Hill* v. *Hill* for assuming jurisdiction, on the other hand he had *Casey* v. *Casey*, which admittedly only concerned wilful refusal, as authority for refusing to assume jurisdiction. On the one hand was the view of Somervell L.J. in *Casey* v. *Casey*:

> "The mere fact that the ceremony of marriage took place in a certain country does not seem to me a ground for founding jurisdiction in that country in cases where the matters alleged in the petition do not in any way dispute the validity of the ceremony as affecting a marriage." [17]

On the other hand there was the view of Lord MacDermott in *Addison* v. *Addison*:

> "Whether a contracting party is capable in the physical sense of discharging the obligations of matrimony seems to be so linked with the nature and quality of those obligations as to be, naturally and aptly, a matter for the *lex loci contractus*. . . . There is much to be said for committing any plea that strikes at the creation of a valid marriage bond—be it one of bodily or mental or juristic incapacity or of a failure to observe the requisite formalities—to the court of the place where the bond was forged. It seems the natural forum to

[16] [1960] P. 130 at pp. 144, 145.
[17] [1949] P. 420 at p. 433.

decide such issues and in practice it will often be that best versed in the law to be applied." [18]

In the event Karminski J. chose to follow *Casey* v. *Casey* since it was a decision of the Court of Appeal and, unlike Collingwood J. in *Hill* v. *Hill*, he found himself unable to distinguish it. Although capacity to consummate the marriage is an essential part of the marriage contract it did not in his view affect the validity of the ceremony and wilful refusal was even more remote from the ceremony.[19] In the event he declined to assume jurisdiction.

Obviously these decisions leave many questions unanswered. The first problem is to ascertain the precise extent of the authority of *Casey* v. *Casey*. It is submitted that it is open to the courts to take the view of either judge. It would perhaps have been preferable had Karminski J. followed Collingwood J. There is after all doubt as to the scope of the decision in *Casey* v. *Casey* and since one High Court judge had already pronounced a very well-reasoned judgment narrowing its scope it might be argued that Karminski J. should have followed him. On the other hand the contradictory arguments of Lord Somervell and Lord MacDermott are both very cogent. If *Ross-Smith* v. *Ross-Smith* should go to the Court of Appeal it will be interesting to hear the arguments advanced on either side; more especially it will be of considerable value to have a statement of the law from that court. Whilst there is scope for satisfaction in that the Court of Appeal have finally dissociated themselves from the reasoning in *Inverclyde* v. *Inverclyde* there is still a lot of growth to be removed before we get a final statement on the relationship between void and voidable marriages and until then the jurisdictional question is unlikely to be settled.

J. A. Andrews.

A Wife's Right to Sell the Former Matrimonial Home

Where a house is jointly purchased by a husband and wife, a trust for sale is created, the husband and wife being both the trustees and the beneficiaries. It is a basic principle of a trust for sale that the trustees are under a duty to sell, but that they have a power to postpone that sale which they may exercise provided they are unanimous.

In *Jones* v. *Challenger*,[1] a husband and wife in 1956 had bought a ten-year lease of a house. They then lived together in the house but the marriage soon broke up, the wife left the house and the husband obtained his divorce in 1959.

Shortly afterwards the wife, now remarried and living elsewhere, applied to the county court for an order under section 30 of the Law of Property Act that the husband as a co-trustee should join

[18] [1955] N.I. 1 at pp. 30, 32.
[19] [1960] 3 All E.R. 70 at p. 74.
[1] [1960] 2 W.L.R. 695; [1960] 2 All E.R. 785.

with her in selling the house or that the property should be sold by order of the court.

Under section 30, the court on such an application may make such order as it thinks fit, and the county court judge held that it would not be reasonable to order a sale in these circumstances and turn the innocent husband out.

On appeal, Donovan J.[2] held that a court of equity, when asked to enforce a trust for sale, must consider whether or not it is right and proper that such an order should be made. Consequently, it was not for the Court of Appeal to determine whether it would have reached the same conclusion as the county court judge, but only whether that judge had committed some error of law which vitiated the manner in which he had exercised his discretion.

The learned judge could find no such error and held that the husband could lawfully continue to live in the house but " justice requires that the wife should be paid the value of her interest . . . and that the wife should, therefore, cede her share of the joint tenancy to the husband."

The view of the majority of the court, however, which was stated by Devlin L.J., was opposed to this. Devlin L.J. accepted that in a " simple uncomplicated case of a trust for sale of freehold property " any one trustee could enforce a sale.[3] He then held that in the present case the wife could enforce a sale. It is, however, in his survey of the law of joint ownership, although in strict theory *obiter*, that the interest of the case lies.

In *Re Buchanan-Wollaston's Conveyance*,[4] four owners of separate but neighbouring properties jointly bought a piece of land and covenanted with each other to keep it as an open space. One of the four subsequently applied under section 30 for the land to be sold. This application was refused as the court would not allow the voice of one who was in breach of his obligation to prevail.

In *Stevens* v. *Hutchinson*,[5] a husband and wife owned a matrimonial home on trust for sale. A judgment creditor of the husband's applied for an order under section 30 which was refused on the ground that the creditor could not apply as he was not a person interested under the trust. Upjohn J. declared that in any event the creditor could have had no better right than that of the husband who could not have obtained an order which would have turned the wife out of the house.

Devlin L.J. accepted this last statement. The position is, therefore, that although during the currency of the marriage there is a duty to sell imposed by section 34 of the Law of Property Act, the court will not enforce it. Why should this be? Because in the

2 Quoting Lord Greene M.R. in *Re Buchanan-Wollaston's Conveyance* [1939] Ch. 738.
3 *Re Mayo* [1943] Ch. 302.
4 [1939] Ch. 738.
5 [1953] Ch. 299.

purchase of the home, just as in the purchase of the open space to benefit others neighbouring in *Buchanan-Wollaston's Conveyance*, there existed a secondary or collateral object, namely to provide a continuing matrimonial home. If the court were to enforce the trust for sale it would be defeating the collateral object and this it will not do.

After a divorce, however, the collateral object can no longer exist and on an application under section 30 the court will then "take such action as it thinks fit." The criterion for the court, however, is not to do what is reasonable.

> "The test is not what is reasonable. It is reasonable for the husband to want to go on living in the home: it is reasonable for the wife to want her share of the joint property in cash. The whole question is whether it is inequitable for the wife, once the matrimonial home has gone, to want to realise her investment . . . It clearly is not. The conversion of the property to a form in which both parties can enjoy their rights is the prime object of the trust: the preservation of the home as a home for one of them singly is not an object at all. If the prime object of the trust is made paramount as it should be, there is only one order that can be made."

We have come a long way since 1925 when the beneficiaries' rights under a statutory trust were declared to be merely the proceeds of sale and the rents and profits until sale. Denning L.J. in *Bull* v. *Bull* [6] declared beneficiaries' rights to be as large as those of an owner before 1926, except that today they are equitable and no longer legal. A beneficiary, he held, had, therefore, in addition, a right to physical possession of the property held on trust for sale. Now, as appears from the judgment of Devlin L.J., one spouse trustee during the marriage cannot be compelled to perform his 1925 statutory duty to sell the property.

It would appear that the decision in *Jones* v. *Challenger* is not to be limited to cases of husband and wife. Where two sisters pool their life savings to buy a small cottage for their old age, can it be that one can force the other to sell? Consider also two friends who set up a market garden and jointly buy two acres of land. The collateral purpose of the purchase is to supply a livelihood for each of them. When the two friends quarrel must both of them sell out?

D. G. Valentine.

[6] [1955] 1 Q.B. 234.

REVIEWS

THE CRIMINAL PROSECUTION IN ENGLAND. By PATRICK DEVLIN. [Oxford, at the University Press. 1960. viii and 118 pp. 15s. net.]

ONE of the lesser, and I trust least controversial of the revolutions of our times is the change in the attitude of the judiciary in the matter of discussing the law and its administration. Fifty, or even thirty years ago a judge did his work on the bench, and occasionally presided over a Commission entrusted with the task of reporting on some technical branch of the law, or possibly occupied some honorific post in a university, but it was generally felt that he ought not to write a book, give a lecture, or occupy himself with anything outside the strict routine of his judicial office, unless in one of the limited ways already indicated. This convention seems to have been successfully shattered by the present generation of judges, and in this movement Devlin L.J.—he can hardly expect to disguise himself by appearing on the title page of this book as Patrick Devlin—has played a prominent part.

This change in attitude has already enriched our legal and semi-legal literature with several outstanding works, destined to be classics, most of which first took shape as courses of lectures, particularly those in the Hamlyn series, to which of course Sir Patrick Devlin made an important contribution in his *Trial by Jury*.[1] The present volume originates in the same way, that is in the Theme Lectures given at the Law School of Yale University in 1956, which are indeed a sort of sequel, in reverse, to the earlier course; for they deal with the proceedings anterior to a criminal case being opened to a jury, indeed anterior to the arraignment of the prisoner.

Sir Patrick deals with four topics: general principles, interrogation, arrest and detention and the legal process. In their finalised form the lectures are of somewhat unequal length, that on the interrogation of the suspect being very nearly twice as long as any of the others. It is, of course, concerned with the activities of the police in a prosecution, as indeed is the third lecture. In the result the volume provides an analysis of the part played by the police in the organisation of criminal proceedings. As this is carried through with all the acumen, understanding, and wisdom that we have become accustomed to expect from the author, and as much of it probes and searches into areas of police activity which have previously only been explored in a superficial way, if at all, it will readily be realised that the book makes much the most important contribution to our understanding of this subject which has so far appeared.

Although Chapter I is in a sense preparatory to the investigation already mentioned it provides an illuminating historical account of the development of the present day English arrangements for prosecutions. During the course of this the author brings out and underlines the points of basic importance. Some of these have not, I think, previously been placed quite so firmly and clearly in the picture. In particular he throws new light on the constant struggle which has gone on between the executive and the judiciary in connection with the administration of criminal justice. The executive is concerned with the maintenance of order; the judges with the compulsive demands of their conception of justice. So as to ensure that order is preserved and the security of the State maintained the executive is prepared to sacrifice some

[1] Reviewed 20 M.L.R. p. 515.

innocent persons but the courts have on the whole taken the view that individual cases must be dealt with on their merits. This requires above all fairness of approach: for whatever the short term interest may be as regards obtaining convictions, in the long run *salus populi* is best secured by the doing of justice—both in appearance and in actuality.

It cannot be doubted that despite some temporary aberrations the instinct of the English people has supported the judiciary in this conflict, and this is no doubt why, on the whole, justice has triumphed over expediency. The historical account of how this has happened is one of the most interesting features of this book.

Thus in the middle ages the executive invented the powerful police weapon of the justice of the peace which was brought to perfection in Tudor times and maintained essentially that aspect until well on in the last century. But the justice was a part of the judicial apparatus as well as of the executive, so the superior courts were able to exercise some sort of control, and eventually to insist that judicial standards should be observed. The eventual result of this was that the magistracy became that subordinate echelon of the judiciary which we know today, and the modern police force had to be erected to take its place. But "the constant drift . . . from unfettered administrative action to regulated judicial proceeding" has gone on and "the police have already in some respects become a quasi-judicial body. Beginning their work of inquiry as freely as the justices began theirs the police find themselves more and more controlled by rules, partly self-imposed, and partly derived from the mandates of the judges." To show how this situation has developed is one of the main objects of this book.

An interesting contrast is drawn between the position of the police in most continental countries, such as France, where the control of the police is secured directly from higher executive authority and that in England where the control is "remote." This "remote" control is exercised partly by public opinion, which expects a certain "standard behaviour" from the police—this has been well brought out in some recent critical cases—and partly by the judges who can not only express disapproval of particular conduct, but can exercise a sanction through the exclusion of evidence wrongly or even unfairly obtained. In this connection the close connection between the bar and the judiciary is important—"the bar not only 'transmits' the judge's power, but enables him to exercise it much more informally than otherwise he could." Moreover the bar is in pretty close contact with both prisoners and police and can not only "transmit" its knowledge, but on its elevation individually to the bench takes its knowledge into the ranks of the latter.

The detailed working out of this thesis is the subject-matter of Chapters 2 and 3. This involves a fairly close analysis of some of the more important rules of evidence and the way they are actually applied in the circumstances of a criminal trial, and an illuminating discussion of the Judges' Rules. The development of the strength and importance of these theoretically quite informal and non-coercive suggestions for a code of conduct for the police is quite typical of the English outlook and method. As Sir Patrick says "the Rules undoubtedly require the observance of a very high standard and it may be of a higher standard than the average policeman was in the first instance naturally inclined to adopt."

While in a formal sense the Rules are not binding, in practice they are enforced by the judges through their control over the trial, and also to some extent by the "habit of the police never to admit of the slightest departure from correctness" which must in the end have the effect of securing a fairly uniform observance. Nevertheless as Sir Patrick points out there is, particularly in certain types of case, a disquietingly high percentage of confessions by accused persons, much higher than in the corresponding cases in Scotland. A proportion of these seems highly likely to be due to a "tendency to press interrogation too hard against a man believed to be guilty." It is

difficult to judge how large this proportion is for as Sir Patrick points out there are a number of other equally cogent reasons why one would expect a high proportion of confessions even during the most fairly conducted interrogation. He does not suggest any additional methods of eliminating the black cases but there is obviously room here for further research and thought.

Even in cases where confessions are wrongfully obtained, the results, such as the discovery of stolen property, may be put in evidence. This has always seemed to me seriously to weaken the value of the rule against the illegal extraction of confessions. Similarly, documents may be put in evidence against a prisoner even if they were unlawfully obtained by the police in the first instance. Sir Patrick evidently thinks that this last rule at any rate is contrary to the spirit of the Judges' Rules, and may be altered if some modern Wilkes will arise to test it in the Court of Criminal Appeal.

The situation as regards arrest and detention (Chap. 3) is better known to English lawyers, and the procedure in Magistrates' Courts (Chap. 4) is even more familiar. Sir Patrick is of course discoursing to American Lawyers and does so in felicitous and lucid language, but these lectures are likely to prove of less interest to his compatriots than the earlier ones.

It is useful that the Judges' Rules themselves should be given in an Appendix.

C.

Causation in the Law. By H. L. A. Hart, Professor of Jurisprudence in the University of Oxford, and A. M. Honoré, Rhodes Reader in Roman-Dutch Law in the University of Oxford. [Oxford: Clarendon Press. 1959. xxxii and 454 pp. 55s. net.]

Common lawyers have been continuously troubled by problems of causation. Nor have such shibboleths as "proximate cause," "last opportunity" and the rest afforded much help to judge or jury. Indeed, one has a sneaking sympathy for the Irish High Court Judge who evaded the task of explaining the tangled rules of "last opportunity" to the jury in a running down action by asking them to answer "the simple question: Which car hit the other first?" In this fascinating and scholarly volume (as in their earlier articles) Professor Hart and Mr. Honoré endeavour first to identify the sources of confusion surrounding the legal use of causal language. They agree with the judges that the lawyer uses "cause" in the sense of the "plain man," not of the scientist or philosopher; and they demonstrate why philosophical "theories" of causation have had so little point of contact with legal practice. In their examination of what the lawyer has taken over from the plain man, when he speaks of cause, they discern three separate notions. The central concept is that of a contingency initiating a series of physical changes; but, in addition, there are the further concepts of providing a man with a reason, and of providing a man with an opportunity, for doing something. The major question discussed in this book is the extent to which these concepts are relevant to a consideration of the extent of legal liability.

When a legal rule is stated in terms of a man's being punishable, or liable to pay compensation, for harm which his act has caused, does liability, and does the limit of liability, depend on causal concepts, wholly, or in part, or not at all? The vagueness of the rules enunciated in the courts has led to a double attack upon the traditional "causal" view: there are those who say that the courts have employed causal language as a mere disguise for judgments of policy and expediency and for judicial intuition; there are others who say that, although the courts have honestly endeavoured to answer

questions of liability and remoteness in terms of causation, they should now abandon that hopeless endeavour in favour of the open adoption of a rule permitting a judge to decide simply as a matter of policy what limit ought to be imposed on liability. The authors' principal aim is to evaluate this modern substitution of policy for causation. They examine the grounds on which is based the modern contention that there is no difference between causal and "policy" limitations on liability, *viz.* (i) that rules for the determination of proximate cause cannot be found, and (ii) that legal responsibility should not depend on common sense principles of causation, even if such can be found. After detailed study of the English, Commonwealth and American law of tort and crime, together with an examination of contract and even evidence and procedure, the authors conclude that in fact the courts have had their minds dominated by the three causal concepts already described. Admittedly, the courts have not been consistent in employing these concepts as tests of the limits of legal liability, but the authors have been able to make more than a brave show in their attack upon the view that policy alone determines such questions. The fashionable "harm within the risk" doctrine is demonstrated to be a supplement to, and not a substitute for, causal doctrines.

Yet a doubt remains. The theory which substitutes policy for rules appeals to few lawyers, since it emphasises the element of indeterminacy in the law. But does the adoption of the authors' concepts of causation make any the easier the lawyer's task of forecasting what limit the court will impose on liability in any particular case?

In Part III, the authors examine various continental theories, in particular the theory of conditions and the adequate cause theory, as debated by German jurists. It is remarkable that these theories have been worked out principally in connection with the criminal law, whereas the common lawyer has been more concerned with causation in the law of tort. Is there any significance in this fact? Whatever be the answer, the German development of legal causal concepts against a background of systematic philosophy serves to emphasise the significance of the statement that the common lawyer has adopted the plain man's notions. At least, the common lawyer seems in less danger of falling into conceptualism, as this brilliant book demonstrates.

J. A. Coutts.

Company Law. By H. Goitein, m.comm., ll.d.(Lond.), Professor of Commercial Law, University of Birmingham. [London: The English Universities Press, Ltd. 1960. 277 pp. 25s.]

A good lecture must not merely transmit accurate information. It should also attract the listener and stimulate his interest. These are commonplaces. Does the same hold good of textbooks? The answer to this question seems to be far less clear. A glance at any shelf filled with students' manuals shows that many authors seem to think that they have done their duty well if they have provided correct information. That their works should attract or inspire, does not seem to them to be necessary. Some of them would, one presumes, shudder at the idea that plodding through their pages should be anything but hard grind.

It is refreshing to see that the author of the present work subscribes to no such orthodox thoughts. Although he has set himself the task of providing sound basic knowledge, he has used every legitimate device to make his book attractive and interesting reading. A very clearly and well-written text, skilfully selected examples—both from actual and from imaginary cases—constant references to the economic background of the rules which are discussed, well chosen excerpts from Committee reports, clippings from newspapers and a truly extraordinary ability to explain even the more difficult and

technical aspects of company law have combined in producing a book that no student of company law should miss. As a first introduction to this complex field it could hardly be surpassed. The author very rightly does not simply state legal rules. He places before his readers economic and financial problems and then shows how the law has dealt with them. This approach to the task of teaching law is more usual on the Continent than in this country. The present little work shows convincingly how much even an elementary work can gain from its application.

Of course, nobody can produce a small book like this without displeasing some readers. Everybody has some pet cases that he would like to see included and his own particular views as to what is important and what is not. To please all is plainly impossible. In the present reviewer's opinion the chief drawback of the work is that the learned author has allotted too little space to the law relating to private companies. Most of the students whom he wishes to teach are more likely to gain their spurs in this field than in the practice relating to public companies. It is therefore surprising that the author devotes less than three pages to this topic, which also appears in his book at a most unexpected and really inappropriate place: *i.e.* in the chapter on "alteration of articles." Foreign companies are stored away in the same place. There are some other minor blemishes: cases which are not actual company cases appear in the chapter on the ultra-vires doctrine, occasional references to foreign laws are misleading (in particular on p. 33), here and there an error has crept into a quotation or a reference is entirely missing. In his instruction for the use of his manual the learned author advises his students to read by way of supplementation of his book several excellent works. But he omits to mention Professor Gower's masterly *Modern Company Law*, to which his own work provides a good stepping stone. These, however, are points which can easily be remedied in future editions. There can be no doubt that this is an outstanding little work, which every student can use with both pleasure and profit.

E. J. Cohn.

Parliamentary Supervision of Delegated Legislation, The United Kingdom, Australia, New Zealand and Canada. By John E. Kersell, Assistant Professor of Politics, McMaster University, Hamilton, Canada. With a foreword by Sir Cecil Carr, K.C.B., Q.C., LL.D. [London: Stevens & Sons, Ltd. 1960. xii and 178 pp. (with index). 25s.]

In his preface to this book the author tells us that it is, in part at least, an attempt to draw together some of the literature which has dealt with parliamentary supervision of delegated legislative powers and that it is a less comprehensive version of a Ph.D. thesis. This is, perhaps, to give too modest an impression of the scope of the work. The sections devoted to Australia, New Zealand and Canada contain material which would not otherwise be readily available to United Kingdom readers and include much of interest, clearly set out, from the comparative point of view. The author need not fear that British readers "may think that the problem has now been largely solved in practice, and, therefore, that the present study may be 'purely academic.'" Even if the problem has been largely solved in the United Kingdom this study is of value here in that it describes, in a pedestrian fashion suited to the subject, the British system of control of delegated legislation, making full use of the reports of the Select Committee on Statutory Instruments and other official sources. Such a detailed exposition as this has not been previously attempted.

It is not unduly theoretical and is free to a great extent from the air of disclosing and denouncing arcane administrative practices which has often enveloped academic studies in administrative law. It is re-assuring to read in the preface that a great deal is owed "to many persons who have an intimate and practical knowledge of the subject, but have been too busy themselves to publish." There are, indeed, many persons who are privy to the formerly averred administrative mysteries. The number of lawyers, for example, who regularly have a hand in delegated legislation is not small and is larger than the number engaged in some specialised lines of private practice. The days of dubious legislation and devious devices are really over, if they ever existed, and Dr. Kersell recognises this and, indeed, helps to demonstrate it.

The index (for which the author is not responsible and hence feels free to praise as a fine one) surprisingly omits the entry "*ultra vires*." Naturally this principle is referred to in various places in the text but the omission is perhaps symptomatic of a certain weakness on the legal side. The fourth and last specified ground on which the Special Orders Committee of the House of Lords reviews certain statutory instruments is "whether there are doubts about *vires*" but the House of Commons Select Committee on Statutory Instruments does not in terms specify such a ground, though that Committee's third ground ("makes unusual or unexpected use of the powers conferred") "catches cases which a member might think were *ultra vires* cases," according to Sir Cecil Carr ("Parliamentary Control of Delegated Legislation," *Public Law*, 1956, at p 209). Dr. Kersell, however, considers (p. 74) that this third ground "finds its parallel" in two of the House of Lords' Committee's, the first and third, and not also, apparently, the fourth. It is thus not clear how he thinks *ultra vires* is a ground for scrutiny by the Select Committee. The *ultra vires* objection seems to be one of those, described as "legalistic" (p. 87), which may lead to "legalistic and constitutional debates" (p. 89). "Legalistic" in recent years has become something of a vogue word in some quarters, even legal and judicial ones, strange as it may seem. It implies impatience with legal criteria and it is odd to find a champion of constitutional propriety and legality like Dr. Kersell falling for it, to continue the contemporary idiom. "A politician or an administrator may nowadays describe as 'Legalistic' a lawyer's decision or advice which conflicts with a policy or proposed course of action. It is always clear from the context that the adjective is used in an unfavourable sense and is in some way distinguished in the mind of the speaker or writer from 'judicial' or 'legal'" (*vide* the present reviewer's article "The Word 'Legalistic,'" *Scots Law Times*, 1952, pp. 185–187).

Referring to the right to appeal to the courts on the ground that a particular piece of delegated legislation is *ultra vires* of the enabling Act Dr. Kersell says (p. 124): "Government draftsmen have, however, proved themselves most ingenious in phrasing grants of power so as to limit the authority of courts in this regard, and have been careful, also, not to produce instruments which go beyond the limits of the enabling legislation." Sir Cecil Carr has also written (*op. cit.*, p. 207) of "the extreme width of the law-making powers delegated" and "the scrupulous care exercised by departmental lawyers." It is true that the law reports do seem nowadays to record few *ultra vires* decisions against government departments but Sir Carleton Allen has commented (*Law and Orders*, 2nd ed., 238): "Not a few rules and orders are 'border-line cases' and give rise to reasonable doubts whether they fall within their appointed *vires*: but it is only a very limited number of citizens who are in a position to question them. The executive, without necessarily intending deliberately to violate the law, is in most cases fairly safe in taking a risk of overstepping the line in the interests of what is considered to be efficient administration." And he has elsewhere remarked ((1956) 72 L.Q.R. 31) that "it is perhaps fortunate for general convenience, though not for the integrity of our law, that the doctrine of *ultra vires* is not

more frequently invoked, as I believe it might well be, if it were not as costly as it is uncertain." Whether or not the doctrine is rarely infringed by statutory instruments it is not always an easy principle to avoid infringing, even when the enabling words are wide. Draftsmen are aware of this difficulty, as are administrative lawyers who practise in the courts and in administrative jurisdictions. How often are the *vires* of regulations canvassed before, during, and after their making!

It would have been more realistic if Dr. Kersell had expounded and illustrated further the nature of the "injustices" which he considers may be "perpetrated through statutory instruments" (*cf.*, *e.g.*, pp. 20–21, 166–167). When an individual complains it usually means that all affected by the regulation are also suffering from the alleged injustice and that it would be so described by him even if the provision formed part of an Act of Parliament. It is not usually appropriate or sufficient to say (*cf.* p. 38) by way of characterising these envisaged "injustices" that "conscientious civil servants can, if left unchecked, seriously compromise basic elements in the democratic complex."

W. H. D. Winder.

Natural Justice. By H. H. Marshall, C.M.G., LL.B., Q.C. (Nigeria), of Gray's Inn, Barrister-at-Law; Attorney-General for the Northern Region of Nigeria. [London: Sweet & Maxwell Ltd. 1959. xxiii and 201 pp. 35s.]

This is the first monograph to have been devoted entirely to an examination of the rules of natural justice: *nemo judex in causa sua* and *audi alteram partem*. The author traces the historical evolution of the principles in English case-law and goes on to consider their application in proceedings before the ordinary courts, arbitrators and domestic tribunals and in administrative law. He also deals briefly with natural justice as a test of the validity of foreign judgments, natural justice in relation to criminal appeals to the Privy Council, and the test of conformity with "natural justice, equity and good conscience" which is applied to determine the acceptability of customary law in some African territories.

The cases are accurately summarised and carefully arranged. The author is happiest when dealing with proceedings before courts *stricto sensu*; no decision of importance has escaped him, though one would have welcomed his views on whether it is permissible to establish actual bias (as distinct from a real likelihood of bias), and the statement that in modern times "where it is found that there is no person available to hear a case except one who is interested in the result, the courts do not apply the doctrine of necessity" (p. 41) calls for further elaboration (*cf.* the recent *Barnsley* licensing case). He is least happy when dealing with natural justice in administrative law. Too many of the really difficult questions are unasked. Many important decisions are not cited; the list of notable absentees includes *Ex p. Venicoff*, *Ex p. Fry* and the much-quoted *De Verteuil* v. *Knaggs*. The case-law on the absence of an implied duty to disclose inspectors' reports on inquiries in connection with orders affecting land is discussed without any mention of Ministry of Housing and Local Government Circular No. 9/58 or of its effects. The chapter on statutory provisions embodying aspects of the rules of natural justice is not very illuminating. And how is one to interpret the comment (pp. 163, 186) that the Tribunals and Inquiries Act, 1958, has helped to reinstate the principle that Ministers and officials should not be judges in their own causes?

Such imperfections inevitably detract from the usefulness of the book for the lawyer in this country. However, the author's hope that it will be "of

particular value to laymen who are called upon to carry out judicial or quasi-judicial functions and to those lawyers and laymen, including native or customary courts judges, who in one capacity or another have a duty to assist in the administration of justice in Her Majesty's overseas territories," is likely to be fulfilled.

S. A. de Smith.

THE UNIFICATION OF SOUTH AFRICA, 1902–1910. By L. M. Thompson. [Oxford: Clarendon Press. 1960. xvi and 549 pp. 50s. net.]

To the minds of all constitutional lawyers the name "South Africa" will immediately conjure up the problems surrounding the "entrenched provisions" in the South Africa Act, 1909. To others different problems will occur. Why, for example, is South Africa a unitary, rather than a federal state? What is the history of the South African colour problem and of apartheid? For this latter question is not solely a social matter; as lawyers we should remember that it concerns the fundamental rights of the citizen.

This is an important book, and, although not a law book, it merits the serious attention of constitutional lawyers as well as constitutional historians. The author is Professor of History in the University of Cape Town, and with the exhaustive use of contemporary documents he has traced the constitutional history of South Africa from the end of the Second Boer War to 1910, when the first General Election in the new Union of South Africa took place. The book is a fascinating and detailed study, written in a lucid and lively style, and complete with a map and tables of all the relevant statistics. Professor Thompson examines critically all the constitutional steps during the eight years covered by the book, both in South Africa and in the United Kingdom where the Liberal victory at the 1906 General Election made a vital difference to the attitude of the United Kingdom Government to independence of the South African colonies, and ultimately to their union. It is salutary to be reminded of the part played by Lord Milner in, albeit unwittingly, creating a bitterness between the Afrikaners and the British stock in South Africa which can still be seen today. Again we read of the work of the "Kindergarten" and of the men like Botha and Smuts in founding the Union.

The author is far from happy about the way things have turned out today. He shows that the founders of the Union believed that a sovereign Parliament would be the best constitutional instrument for handling the difficult problems of the country, particularly those of race and language. "In following the British example," writes Professor Thompson (at pp. 482–483) "they had ignored the fact, that in so far as the flexible character of the British Constitution met the needs of the British people, that was because they had become a comparatively homogeneous people, and their respect for constitutional conventions, for political compromise, and for personal liberty was strong enough to form an effective barrier against arbitrary action by the Government of the day, whereas the essence of the problem confronting South Africa was that her peoples were extremely heterogeneous, and the colour consciousness of most of the whites and the national exclusiveness of most of the Afrikaners were potent enough to override any feelings they may have had for conventions, for compromise, and for the liberties of others. Since a flexible constitution provides no legal safeguards against arbitrary government, it was the very worst prescription for such a country. So long as Afrikaners remained in a political majority they would have the opportunity, and therefore the temptation, to stand together, to obtain control of Parliament, and to impose their will on the other inhabitants." Thus the author concludes that a federal constitution would have been a happier

solution for South Africa, and he would have preferred that of the United States, with its division of powers even in the centre between the legislature, the executive and the judiciary, to have been a model for South Africa, rather than the constitution of the United Kingdom.

D. C. M. Yardley.

Dymond's Death Duties. Thirteenth edition (in 2 Volumes). By Reginald K. Johns, ll.b.(Lond.) of the Estate Duty Office, an Assistant Controller of Death Duties. [London: The Solicitors' Law Stationery Society Limited. 1960. 1088 pp. with 355 pp. of Statutes. Price £7 7s.]

The reader's first reaction when he handles the two volumes of the 13th edition of Dymond is likely to be: could it not have been stated more concisely? The answer is that it could, but that the peculiar quality of Dymond has always been to state the law fully and with accuracy, rather than concisely. It is intended to be a reference book for the practitioner who has a particular problem to solve, and is of little value to the reader—whether student or practitioner—who simply wishes to improve his knowledge of estate duty law.

The work of writing in the new law which has come into being since the 12th edition was published in 1955 has been performed with commendable efficiency. Editors are sometimes tempted to leave the text unaltered, and to add, either in footnotes or at the end of sections, references to new decisions which should more properly be incorporated into the text by a complete rewriting. Mr. Johns however appears to have taken care to do all the rewriting that is necessary. For example, in discussing the necessity that a donor of a gift outside the statutory period must have been excluded from possession and enjoyment, Mr. Johns deals fully with what is perhaps the most important new decision on the case, *Chick* v. *Commissioner of Stamp Duties of New South Wales* [1958] A.C. 435. Similarly the *Barbour* case (*Westminster Bank Limited* v. *I. R. C.* [1958] A.C. 210) has caused a considerable amount of rewriting of the text on section 2 (1) (*d*) of the Finance Act, 1894.

One welcome innovation is that the appendix containing the text of the Statutes is now published in a separate volume, and in a larger type. If the reviewer may be allowed a criticism, it is that the book was allowed to go to press when it was already somewhat out of date in an important respect. Chapter 3 refers to "property passing and property deemed to pass": a distinction which is probably no longer valid, since the dictum of Lord Macnaghten upon which it is based has now been rejected by the House of Lords in *Public Trustee* v. *I. R. C.* [1960] 2 W.L.R. 203. Admittedly the publishers have obligingly included sixteen green pages of addendum, bringing the statement of the law up to December 31, 1959. However, since the Finance Act, 1960, will plainly make the book even more out of date, it is questionable whether the addendum could not have been left to be dealt with in a supplement.

Any doubts the reader might have whether the law of death duties requires reform must surely be dissolved by even a quick glance at this massive book. Estate duty is capricious and uncertain in its application. Whether it may be avoided in advance or not often depends upon circumstances beyond the control of the property owner. It is terrifying to consider the enormous human effort which is expended in the making, amending, applying, and avoiding, of estate duty law.

D. C. Potter.

Insurance. By H. E. Raynes. Home University Library No. 244. [London: Oxford University Press. 202 pp. 8s. 6d. net.]

This is a useful addition to the well-known series of publications. Separate chapters deal with the various kinds of insurance business, perhaps the most interesting being those on accident insurance and reinsurance. All these chapters describe the origin of the particular branch of business and its present scope and conduct. Anyone concerned with teaching insurance law should welcome the background provided in this little volume. He will also discover pointers indicating where emphasis is required not because of the legal interest or difficulty of a particular problem but because of the frequency and business importance of a phenomenon. For instance, attention is drawn to the fact that as a result of the greater care now devoted to packing the importance of the Memorandum in the Lloyd's marine policy has greatly diminished. On the other hand, the growth in volume and variety of reinsurance suggests that perhaps more time than is usual might be given to the law of reinsurance.

Another welcome feature of the book is its description of the growing public control—still, some may think, inadequate—of the insurance business and of the various forms in which the Government itself engages in insurance business. Insurance finance, a problem also of considerable political interest —itself recently discussed, for example, by Professor Titmuss in The Irresponsible Society (Fabian Tract No. 323)—is outside the scope of this volume. The book also contains a sketch of insurance law, confined to basic principles and of course not intended for law students. But these will derive great benefit from reading this lively survey as an introduction to their study of insurance law.

A new edition would benefit from a rather more detailed index. Some reference might also be considered to the insurance against libel actions taken out by publishers and to compulsory aviation and nuclear installations insurance.

O. C. Giles.

Enactments and Orders Concerning Savings Banks. By C. E. Lawton, o.b.e., ll.d., Barrister-at-Law. Two vols. [London: Savings Bank Institute. 1959. 1052 and (index) 48 pp. £3 net.]

In 1949 Mr. Lawton published his guide to the Law of Trustee Savings Banks (reviewed in 13 M.L.R. p. 539) which was the first comprehensive textbook on the subject. In the present volume he has assembled the statutory material on which the administration of the savings banks depends, so the work is a companion volume to the earlier one, and as such will no doubt be welcome to the large number of officials who are responsible for the running of these banks, the expanding work of which has been a marked feature of post-war economic development.

Mr. Lawton devotes his first volume to legislation and his second to statutory rules and orders and statutory instruments. Owing to the absence of uniformity, not perhaps very serious, between the law in Great Britain and that in Northern Ireland, in Jersey, in Guernsey, and in the Isle of Man something like a fifth of the book is taken up with the position in these smaller jurisdictions. Comprehensive as is Mr. Lawton's selection from the Statutes he does not include several of those which appear in Watts' *Law of Savings Banks*: these, however, seem at the present time to be largely of historical interest.

Mr. Lawton should now turn his attention to a collection of the more important rulings of the registrar, to which could profitably be added a selection from the decisions of the High Court.

C.

Williams on Title, 2nd edition—Supplement 1959. By W. J. Williams B.A. [London: Butterworth & Company (Publishers) Ltd. 1959. ix and 29 pp. 7s. 6d. net.]

Those who use the admirable treatise *Williams on Title* will be happy to add to their equipment of law books the Supplement to the second edition.

As the Preface observes, "the general arrangement of this Supplement follows a now familiar form and no difficulty will arise in its use with the original volume."

There is the usual apparatus of tables of statutes and cases. Cases decided after the publication of the second edition are not merely listed but are shortly yet helpfully epitomised and there are *corrigenda* of the text of the volume to which it is a supplement. *Williams on Title* is so widely used that this Supplement is sure to enjoy, as it calls for, similarly wide circulation.

Bertram B. Benas.

La Rôle des Organisations Internationales en Matière de Prêts et d'Emprunts—Problèmes Juridiques. By Jean Salmon. [Published under the Auspices of the Carnegie Endowment for International Peace, European Centre. London. Stevens & Sons Ltd. xix and 366 pp. 42s.]

This work, which promises a treatment of the legal problems relating to international loans in which international organisations are concerned, is introduced by no less than three prefaces, one by the President of the European Centre of the Carnegie Foundation, one by Professor Reuter of the University of Paris and one by the author. The first two of these are highly laudatory of the author's achievements. The present reviewer finds himself regretfully unable to join in this praise. In his view the author has failed to advance the study of the legal—as distinct from the historical, economical or political—problems of the topic to which his work was devoted.

The first part of the work gives a chronological summary of the various loans obtained by international organisations in the past. This survey, which ranges from the financial support granted to the European Danube Commission to loans obtained by UNESCO and the World Health Organisation, is well written and would, no doubt, be of interest to political scientists, financial advisers and—perhaps—to historians. But to the lawyer it can hardly be of much greater significance than, say, a history of the loans granted to oil companies or to steel producers. One of the three conclusions which the author derives from this part of his investigations is that international organisations have lent from and to states, private persons and the public at large and that consequently all imaginable possibilities relating to the person of the party contracting with the international organisation have already materialised. Most readers will be inclined to feel that a less extensive historical research might have justified this (and the other two) conclusions.

The second part is headed "common legal problems." The expectant reader approaches this part hoping that it would bring the real kernel of the author's endeavours—a sort of "general part" of the law relating to loans by or to international organisations. Such hopes are quickly disappointed. The first of the three chapters of this part deals with the question of the choice of law. In the author's view public international law applies wherever the loan relation is either between an international organisation and a state or between an international organisation and another international organisation. In all other cases municipal law applies. This may be right. It corresponds, no doubt, to the traditional doctrine. But the author has failed to advance novel or convincing grounds for it. Neither the references to the convenience

or interests of lenders nor those to decisions of international tribunals relating to contracts by states with private individuals can make up for this defect. The rest of the second chapter reverts once more to the descriptive method of the first. There is a detailed discussion of the competence of the various international organisations (including the defunct ones) to lend and borrow money and we are told how the various contracts described in the first chapter were negotiated. There is very little law in all this and nothing at all that could be called "general"—except perhaps the question as such.

The last part gives up all pretence at coming to grips with the legal aspects of international loans in general. We are once more conducted on a tour through the very same individual loan agreements which were the subject-matter of the first two chapters—this time with a view to considering what guarantees of payment were accorded to the lender, what (if any) procedural provisions were made for enforcing the debt and what law was applicable to the individual contract. This part makes undoubtedly interesting reading—the author writes always lucidly and attractively—but there is hardly any connection between the individual chapters discussing the particular loans. The author has here and there contributed to the discussion of problems of detail—some no longer of any theoretical or practical relevance—but this chapter succeeds as little as the earlier ones in persuading the reader that there is more at issue than problems relating merely to the particular case and of interest to those only who are or were concerned with it.

It may well be that international loans and the position of international organisations in relationship thereto pose a number of common problems. If so, the present study has done no more than prepare some part of the path which a proper legal investigation of these questions will have to pursue.

E. J. Cohn.

THE INTERNATIONAL LAW OF THE SEA. 4th ed. By C. JOHN COLOMBOS. [London: Longmans, Green & Co. Ltd. 1959. xvii and 783 and (index) 27 pp. 60s. net.]

Readers will recognise this book as the fourth edition of the original work by the late Professor Higgins and Dr. Colombos which first appeared in 1943. Since its first appearance *Higgins and Colombos* or *Colombos*, as it is now, has acquired considerable authority for itself in the English speaking world. Indeed the fact that it has been translated into the other five major European tongues tends to show that its merits are now universally recognised.

An earlier reviewer, Sir Arnold McNair, said of this book: "The test of a book of this character is not originality, for it is not the business of the authors to invent the rules of the law of the sea, but the degree to which it gives a ready answer to the vast majority of questions to which the use of the sea gives rise, and indicates the means of access to the sources which are responsible for the rules. In my opinion this book satisfies the test remarkably well." In the main the present reviewer is of a like opinion. *Colombos* is and deserves to be a work of authority and any new edition is to be welcomed. The wealth of the material which is cited and the authority and clarity of the text make it a book which is well above the ordinary. There is a great need for an objective approach to the problems of international law and this book is generally speaking objective. At least it is an objective statement of Anglo-American jurisprudence on the subject, though occasionally one finds some surprising statements.

To describe the British attempt to reach a compromise at the Geneva Conference of 1958 on a six-mile territorial sea with a qualification preserving existing rights of passage as "a tactical error and a vain effort" [p. 93] and to describe its overwhelming defeat as fortunate because "Had it been

adopted it would have undermined the traditional rule of a three-mile limit of territorial waters for which so many generations of eminent British statesmen and jurists had strenuously fought for over a century" [p. 94] might seem a little conservative. The Anglo-American concessions at the 1960 Conference must have given Dr. Colombos a nasty shock though presumably he regards the failure of the Conference with some satisfaction. But should we not face reality? The Geneva Conferences were a defeat for Anglo-American diplomacy. Whilst it is not true to say that the three-mile rule is defunct it is no longer accepted by the vast majority of states whose views must have some significance in maritime practice.

Dr. Colombos' approach to his subject is the empirical approach so common in Anglo-Saxon literature. His book concerns itself largely with the historical growth of rules and principles moving from case to case, treaty to treaty, and incorporating instances of Anglo-American state practice. Discussion of modern social, economic and military problems is confined to a minimum. Although the reader's interest is never lost, he is left with something less than a complete view of the subject. For example, one would like to have seen more discussion of the problem of conservation of the resources of the sea, the validity of nuclear tests on the high seas and the problems of radiation, and the Inter-Governmental Maritime Consultative Organisation.

In some ways it is perhaps unfair to make these points against a work which sets out only to elaborate the well-recognised rules and principles of the law of the sea and which does so exhaustively and skilfully. On the other hand a book which is referred to by many lawyers, naval officers and others and is the start and finish of the study of this subject for many might attempt more than this. When the subject under discussion is one in which the rules are inextricably bound up with state practice there is something to be said for discussing the factors which are influencing that practice or are likely to do so in the near future.

The book is divided roughly into two halves. The first half deals with the law of the sea in time of peace and the second in time of war. The law of the sea in time of peace is dealt with very adequately though the treatment is subject to the criticisms made above. In dealing with the law of the sea in time of war Dr. Colombos comes into his own. He draws freely on the material which he uses in his book *A Treatise on the Law of Prize*. It is a masterfully thorough exposition of the traditional rules of the law of the sea in war. It is unfortunate that the author largely leaves out of account the emergence of the United Nations. What would be the relevance of the law of neutrality to the members of the UN in a future war? Surely there is an obligation on any writer on any subject of international law these days to consider fully the effects of the new international law created by the Charter. Apart from a short concluding chapter this book fails to take into account the emergence of the new order.

Really the book needs a more thorough revision than it has received. A little modern material is allowed to intrude here and there but in the main the book has survived successive editions with a great deal less change than the rapidly developing law of the sea has experienced. For a book of such importance this is a great pity. Whilst the work is assured of its place as an authority, there seems no reason why it should be left to fossilise.

J. A. Andrews.

THE LAW AND CUSTOM OF THE SEA. By H. A. Smith. 3rd ed. [London: Stevens & Sons, Ltd. 1959. xiv and 291 pp. 21s.]

The second edition of this little book, written primarily "for serving soldiers," "for the wardroom rather than for the law library" (p. viii), was fully

reviewed in these pages shortly after its appearance in 1950. The third edition is only slightly changed, although account has, of course, been taken of such developments as the *Norwegian Fisheries Case*. In particular, the author adheres to his views about the "new and serious problem" created by "the Nuremberg and other 'war crimes' trials which followed the Second World War" (p. 207; it is the author, not the reviewer who persistently employs quotation marks when speaking of war crimes or of the Nuremberg Charter). The opposite view is largely ignored. It must be hoped that the wardroom will be supplied with material which will enable it to form a balanced view on an important point. It would be a great pity if British naval officers came to regard Professor Smith's opinions on this point as representative or authoritative.

F. A. Mann.

Judgements of the United Nations Administrative Tribunal. Numbers 1 to 70. [New York: United Nations. 1958. vi and 476 pp. 22s. 6d. net.]

Since the adoption of the Charter of the United Nations much has been written on the significance of the international civil service and on the problem of the protection of the contracts of service. This problem has been present since the days of the League of Nations and originally contracts were worked out *ad hoc* with the Secretariat enjoying wide discretionary powers of dismissal. In 1928 an Administrative Tribunal was established which soon created a *jurisprudence* which recognised the acquired rights of staff members. The Administrative Tribunal was under the supervision of the League and, since there was no right of action against the League, it was considered, in 1946, that the Assembly could with impunity fail to vote the necessary funds to pay awards made by the Tribunal for wrongful dismissal.

When the United Nations was created, with the Secretariat as one of its principal organs, and with a staff much larger than that of the League, it was decided to establish a common form of contract, Staff Rules and Regulations and a new Administrative Tribunal. From 1950 to 1957, this Tribunal had been called upon to deliver no less than seventy judgments arising from cases in which members of the Secretariat alleged breach of contract by the Secretary-General. The most famous of these cases are those involving eleven United States citizens who had invoked the protection of the Fifth Amendment of the United States Constitution when summoned before the Internal Security Sub-Committee of the Senate, and who were, as a consequence, dismissed by the Secretary-General regardless of the terms of their contracts. The General Assembly declined to pay the damages and asked the World Court for the advisory opinion on the Effect of Awards of Compensation made by an Administrative Tribunal of the United Nations. The Court found against the General Assembly which amended the Statute of the Administrative Tribunal.

Commentators on the matter have been handicapped by the fact that the awards of the Tribunal have not been readily available, although the Legal Department of the Secretariat has always proved helpful to those seeking access to them. Now, however, the first seventy judgments have been published in book form and it is hoped that annual or biennial supplements will be made available. It is also desirable that the awards of the Administrative Tribunal of UNESCO, which deals with the cases of the staffs employed by all the specialised agencies, should also be published at an early date. If this should be done, it would be an improvement if an alphabetical list of cases were added and not merely a table of contents in the order in which the judgments were delivered. Likewise, while an appendix giving a note of the judgment which dealt with a particular Staff Regulation or Rule is useful, it would be more so if the complete text of the Regulations and Rules were

appended, together with the Statute of the Tribunal and the advisory opinion of the World Court. This raw material is useful, but it is only part of the story.

L. C. Green.

Die Enteignungen in der Sowjetischen Besatzungszone und die Verwaltung des Vermoegens von nicht in der Sowjetzone ansaessigen Personen. [Published by Bundesministerium fuer Gesamtdeutsche Fragen. Deutscher Bundesverlag, Bonn.]

This tragic account of expropriation in Eastern Germany was compiled by the Ministry for All-German Affairs of the West German Federal Republic. A collection of laws, regulations and confidential office circulars illustrates the curious method of law-making employed by the revolutionary East German Government, which it has in common with other non-democratic régimes. To remain respectable the trappings of democratic legislative procedure are retained, although in substance there is no difference between an Act of Parliament, a decree or a circular. This account carries the story as far as 1957, four years after that famous June when unrest in East Berlin and provincial cities shook but failed to shatter the communist rule. Since then the expropriation of farmers, artisans and the few remaining private businessmen has continued; the first two groups have been, or are being, pressed into so-called co-operatives, and this publication explodes the myth that the co-operators retain their property when joining the co-operatives. It is rightly pointed out that there is no provision for co-operators leaving the co-operative once they have joined it and taking out the property which they have contributed.

One of the reprinted sources is an amendment of the criminal code, with new crimes against the state and severe penalties for offences which in western countries might be visited with fines in a police court. At least one Soviet crime has been taken over. It is called *Diversion*. Like its Soviet counterpart, *diversionnyy akt*, it involves the destruction of or damage to installations required for the defence or economy of the country; the East German code dispenses with the Soviet requirement of counter-revolutionary intent.

O. C. Giles.

The Jury is Still Out. By Irwin D. Davidson and Richard Gehman. [London: Peter Davies. 1959. 303 pp. 21s. net.]

This is a detailed account of a murder trial in New York which arose out of a clash between two of the notorious teenage gangs which infest that city. The principal author is the judge who tried the case, and it is probably fair to say that such a book could not have been written in any country other than the U.S.A.

The crime itself was peculiarly sordid and despicable—some eighteen or twenty of the gangsters who had gone out to look for their enemies found two lads whom they took to be members of the rival gang, whether they were or not is far from clear on the evidence given, and set upon them, killing one and seriously injuring the other: the idea that this was not fair play never seems to occur to anybody during the proceedings described in this book. Seven of the lads were tried for murder; others being dealt with in the Children's Court. The trial was not one of outstanding interest, the main difficulty being

to establish the degrees of guilt as between so many participants. Nevertheless the book makes fascinating reading for an English lawyer, because of the flood of light which it throws upon American criminal procedure.

If New York State is typical of America, and my own rather superficial experience leads me to suppose that it is fairly so, it can be said that the divergences between their system and our own have become so great as to make their common law origin almost unrecognisable. Yet basically the fundamental elements are still held in common; the adversary system, the jury, the prosecution's burden of proof, and the rules of evidence. In spite of this the English lawyer perusing the pages of this book feels himself in a strange land, a stranger land and in some ways more repellent than if he were to watch a trial in a court of one of our continental neighbours where criminal procedure is generically different.

Nothing could bring out better than such a trial as this the differences of outlook and atmosphere between the two countries, not only legally but sociologically. To begin with it is inconceivable that an English trial judge should produce a book about a trial which he had himself conducted, and that within a few months of its termination. At the most he might contribute a colourless preface to the work of some legal journalist. And this judge who is temperamentally an extrovert is quite uninhibited in respect of his reactions, emotional as well as legal, to everything which takes place during the trial. Thus he tells us of his conversations with his wife about the evidence, applauds or criticises the handling of the case by the various counsel engaged, and even tells us what he subsequently learned from police officers about the antecedent history of the prisoners! This all rather makes one rub one's eyes, and yet the same sort of thing goes on in England; it is only that we do not do these things in public! Perhaps it is well that they should be brought into the open by somebody somewhere.

An American trial judge, at any rate in a criminal case, has an exceptionally arduous task to perform. To begin with he seems to take a much greater part in the administrative arrangements than does his English opposite number. Thus, this book opens with a request to the author from the head of the Homicide Bureau of the District Attorney's Office that he will "consider hearing the trial of the seven boys." And this the judge takes several days to consider including discussions with his wife before he agrees! The relationship between the District Attorney, who is a public prosecutor, and the judge seems to be much closer than would be regarded as proper in England; thus it appears not to be out of the way for the District Attorney or his representatives to look in at the judge's office to discuss the trial arrangements with him in the absence of the legal advisers of the prisoners. And not only the trial arrangements, but even the evidence to be given during the course of the trial (see p. 37). Again the judge apparently busies himself in obtaining legal aid for poor prisoners, even to the extent of making personal appeals for assistance to his old friends at the Bar.

The importance which attaches to getting a satisfactory jury and the challenging which goes on has struck many English observers of American trials: it comes out clearly here. This preliminary sparring seems to establish an emotional tension which is very different from that which exists, of course, in a big English trial. This is evidently accentuated by the constant objections to evidence, and motions to strike statements, whether by witnesses or by counsel, off the record of the court. The judge is much more in the arena, and though he may commit counsel for contempt, a weapon never used here, he evidently has much greater difficulty in keeping his court under control than has an English judge. It is not unknown here for counsel to get cross with one another in a long and tiring case, but the American system lends itself to the generation of irritation, and the scenes between counsel described in this book verging from time to time upon fisticuffs are just not imaginable in an English court.

One obvious and disturbing element in the evidence is the almost monotonous complaint by the prisoners that they were beaten up by the police until they confessed. This was all of course flatly denied, and undoubtedly some of it was false, and some of it was at the most exaggerated, yet one is left with an uneasy feeling that the police methods were open to criticism.

These are just a few of the points which will forcibly strike the English legal reader of this book and which make its perusal so valuable. But it throws a flood of light on some aspects of life in a great American city during the post-war period and brings to life in a vivid way much of the discussion to which we have become accustomed in the sociological journals.

And the major problem which it poses, and poses not only for the American but for the British and for many other communities of the modern world, is that of juvenile delinquency itself. Whether we use harsh punishments or attempt remedial education we seem to make little progress with the solution. Practically all of the lads on trial in this case came from broken homes, though there are a number of sentimental photographs of parents embracing those who were acquitted, and it may be that the problem is too closely bound up with the even bigger one of whither goes society itself?—to be solved at the juvenile level. As the author says "the jury is still out" in respect of their verdict in this matter.

Judge Davidson who is evidently a humane and sympathetic man of wide public experience—he has been a member of his state legislature—devotes a short appendix to propounding his own plan for handling, and he hopes curing, incipient juvenile delinquents. His view is that they must be taken in hand before they reach the stage of committing offences, and as he realises that in a free community this is likely to give rise to stubborn opposition he points out that under existing law, and it is of course the same here, it is possible to deal with children who are neglected or out of control, even if crime has not been committed.

He therefore proposes to designate a number of "problem areas" each of which would have a Local Youth Conference to whom "candidates" for consideration might be referred. After a careful hearing of the evidence, the Conference might decide that the case was made out, and send the youth to a new kind of home, a home which sounds very like one of our own "approved schools" at which he would receive affection, education and training. It is here of course that the crux of the reforming problem lies: it is difficult, if not impossible, to establish in such institutions, the intimate personal relationship which is the vital contribution made in the family. However, if such homes could be kept small it may be that some of them would succeed. They would have the advantage that none of the inmates would be actual criminals: it is the presence of a handful of real scamps in almost any such institution which causes most of the difficulty.

C.

ATTORNEY FOR THE DAMNED. By ARTHUR WEINBERG. [London: Macdonald. 1959. xxiii and 552 pp. 30s. net.]

Attorney for the Damned is a collection of addresses delivered by Clarence Darrow, mainly to American juries in the first quarter of the present century. It has been discreetly edited and informatively noted by Mr. Arthur Weinberg and it contains a brief but extremely sympathetic foreword by Mr. Justice Douglas, one of the most liberal members of the present Supreme Court.

Darrow had the reputation of being the best defence counsel of his day and, in the particular field in which he worked, he has probably never been surpassed. The book undoubtedly gives a clear impression of most of the reasons for that reputation. However, it must fall far short of doing justice to the man. In recent years, Darrow's arguments have reached wide new

audiences through the cinema and the theatre. The Leopold-Loeb trial and the Scopes "Evolution" case in Tennessee, the famous "monkey trial," have been excellently depicted on the screen and stage in the last few years, and the part of Darrow himself has been played with great conviction and impact by suitably outsize actors in both media. In fact, the cinema and the theatre provide almost ideal means for presenting the man and his arguments, for although his pleas undoubtedly had a strong rational basis, his primary appeal was emotional and required a direct audience. As Douglas writes in the foreword, "He ran the gamut of emotions . . ." playing with "full orchestration," and he was obviously an excellent judge of the pressures by which his audiences were to be moved. His rhetoric, however repetitive, must have been tremendously effective to hear. Inevitably, it does not stand up so well in print. Eloquence of Darrow's kind had to be heard rather than read, and although his passionate conviction emerges from the written word, some of his persuasion and much of his impact have undoubtedly been lost in the translation into print. Too often, the reader must feel that the assault on his emotions is too crude and direct, that he is being submerged by sheer weight of word and phrase and that a cooler, more intellectual and less exaggerated approach would have been more appropriate to the issues in question. To hear Darrow's twelve hour plea of mitigation in the Leopold-Loeb case must have been deeply moving, however wearying; to read his words and learn that "There were tears streaming down the judge's face as Darrow finished . . ." leaves quite a different impression, particularly on the more inhibited English reader.

Yet, allowing for this difficulty of translating this type of oratory into print, *Attorney for the Damned* is worth reading for at least three reasons. First, it conveys a clear picture of a most interesting and colourful personality, extremely passionate and courageous and a speaker of great power and conviction. Secondly, Darrow was invariably employed "on behalf of the underdog fighting for equal protection, due process and a fair trial," and the issues with which he dealt so forcefully, racial and religious intolerance, capital punishment, political liberty and the right to work and strike, are of abiding interest and topicality. And thirdly, the book represents a fascinating social commentary on the United States in the early part of the century. To cite just one example, one learns that the small town of Dayton, Tennessee, the scene of the "monkey trial," "became a combined Coney Island, revival meeting and circus. Hot dog and lemonade vendors, fundamentalists, IWWs, anarchists, native Tennesseans, revivalists, Holy Rollers, free-thinkers, artists and more than 100 newspapermen came to Dayton. Western Union installed twenty-two telegraph wires in the city for the use of the newspapermen. Dayton was ready! Signs greeted visitors: 'Read your Bible,' 'Where will you spend eternity?' 'God is love,' 'Sweethearts come to Jesus.'" The teaching of Darwinism in a local school may have been a burning issue in 1925, but how would it have been dealt with in, say, Marlborough, Wiltshire?

S. Prevezer.

Notable British Trials Series. Vol. 83: The Trial of August Sangret. Edited by Macdonald Critchley, M.D. [London: William Hodge. 1959. xxxiv and 233 pp. 18s.]

The trial of August Sangret for the murder of Pearl Wolfe, a girl of nineteen, which is described with a full introduction by Dr. Macdonald Critchley in the latest volume of the *Notable British Trials* series, did not raise any important legal issues. Its main interest lay in the medical evidence of the two pathologists and the official analyst who, between them, effected a remarkable scientific reconstruction of the crime, despite the fact that the body of the victim was already in an advanced state of decomposition.

Sangret, a Canadian private of mixed blood stationed near Guildford in the relevant year, 1942, did not call any witnesses for the defence, but went into the box himself to deny all responsibility for the death of his sweetheart. He was cross-examined at length, but—at least as taken down in the shorthand transcript—replied with astonishing clarity for a semi-illiterate man and made no conclusive admissions. The circumstantial evidence against him, however, not least that provided by the medical men, never left any serious doubt about his guilt.

H. A. H.

THE ADELAIDE LAW REVIEW. Volume 1, Number 1; 1960.

THE arrival of Professor Norval Morris at Adelaide to take up the deanship of the Law School there seems already to have had a stimulating effect, if we may judge from this admirable first number of the law review. The number of excellent legal periodicals emanating from the law schools, or elsewhere, in Australia which after all has fewer than a quarter of our population ought to put us to shame. It is interesting to notice that the American model of student editorship assisted by faculty advice is followed here.

In addition to a number of well written and clearly discussed notes on recent cases, which are very sensibly limited to decisions of South Australian courts, and the usual book reviews, this initiatory number is noteworthy for two outstanding articles. The first of these by the Solicitor-General of Australia (Sir Kenneth Bailey) on "Australia and the Law of the Sea" first saw the light of day as a lecture given to the South Australian branch of the Australian Institute of International Affairs. It deals with the vexed problem of sovereignty over the Australian continental shelf which is viewed in the context of territorial waters generally. This lecture is a model of its kind and makes one realise what a loss to the teaching of law was involved when Sir Kenneth decided to give up his Chair at Melbourne to accept the office of Solicitor-General which in Australia is not a political appointment of the kind we know here.

Professor Morris himself in "A New Qualified Defence to Murder" examines historically and critically the development of the doctrine of self defence as applied in murder trials in Australia which is a "major development in the law of homicide" (*McKay* [1957] V.R. 560; *Bufalo* [1958] V.R. 363; *Haley* (1959) W.N.(N.S.W.) 550). What the Australian judges have been concerned with is the limits of the doctrine of self defence, and the effect of passing beyond those limits, which will result, normally, in "manslaughter—not murder." It is strange that the English courts have never occupied themselves with this problem, though Professor Morris indicates the historical reasons why this has been so, and shows how American courts had, well back in the last century, been reaching for some such solution as that now found in Australia.

C.

THE LEGAL PROFESSION. Fifth edition. By PETER ALLSOP, M.A., Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1960. x and 138 pp. (including index). 10s. 6d. net.]

A FIRST BOOK OF ENGLISH LAW. Fourth edition. By O. HOOD PHILLIPS, B.C.L., M.A., Barber Professor of Law in the University of Birmingham. [London: Sweet & Maxwell, Ltd. 1960. xxv and 316 pp. (including index). 21s. net.]

THESE two books, the one in its fourth and the other in its fifth edition, are now established primers for those who propose to embark on a legal career. They are complementary in that Mr. Allsop's book is a practical guide in the

steps necessary to qualify as a lawyer, while Profesor Hood Phillips introduces the novice to the main features of the legal system which he is to study.

Mr. Allsop begins with a lucid, though quite detailed, summary of the steps necessary to qualify as barrister or solicitor, or to proceed to a law degree in a university, and the rest of the work is devoted to books—what suitable students' books there are, which are appropriate for particular examinations, and, best of all, how to read a law book intelligently and usefully.

Professor Hood Phillips' book is the more substantial work, aiming at providing a survey of the courts, the sources of law, and the general principle of the main fields of law. That he has succeeded in doing this in just over 300 pages is a considerable achievement. A "bird's eye view" book is probably the most difficult kind of law book to write. A broad view by a fast-flying bird at a great height may be meaningless to those making a first acquaintance with the law, and it may be supposed that Hood Phillips' feat in reducing the law of future interests in realty to ten lines is one to be admired by the informed rather than fully understood by the uninformed. However, the student is well served, for he has here as complete a conspectus of our legal system as he can require, and it will serve as an admirable chart when he begins to navigate the sea of text-books and law reports.

F. H. Newark.

Books and Publications Received

AIR Manual (Civil and Criminal). Second edition. Vols. 5 and 6. The All India Reporter, Ltd. Nagpur. 1960.

International Political Science Abstracts. Vol. X, No. 1, 1960. iii and 137 pp. Basil Blackwell, Oxford. 12s.

Journal of the International Commission of Jurists. Vol. II, No. 2. 252 pp. International Commission of Jurists, "Justice", 1 Mitre Court, Temple, London, E.C.4. 7s. 6d.

Tibet and the Chinese People's Republic. A Report to the International Commission of Jurists by its Legal Inquiry Committee on Tibet. xiii and 345 pp. International Commission of Jurists, Geneva.

Encyclopedia of the Law of Compulsory Purchase and Compensation. Release No. 1, June 20, 1960.

Revista De Deredio Judicial. Año 1, Numero 1, Enero–Marzo, 1960; Numero 2. Abril–Junio, 1960. Doctor Castelo, 12. Madrid. $6.

El Enriquecimiento Sin Causa. Por Jorge Fabrega P. 227 pp. Editora La Estrella De Panama.

Sweet & Maxwell's Guide to Law Reports and Statutes. Third edition. 1959. 117 pp. Sweet & Maxwell, Ltd. 21s.

The Elements of Estate Duty. Third Cumulative Supplement to Second edition. By C. N. Beattie, ll.b. 1960. Butterworths. 3s. 6d.

Parteien, Volk und Staat. Dr. Ferdinand A. Hermens. 24 pp. 1960. C. F. Müller, Karlsruhe. DM. 2,60.

The Lawyers and the Constitution. An Inaugural Lecture. By S. A. de Smith. 38 pp. 1960. G. Bell and Sons, Ltd., London. 3s. 6d.

Arkiv for Sjørett. Blad 4–Hefte 3. Juni, 1960. Universitetsforlaget, Oslo.

The Corporate Income Tax in Sweden. By Martin Norr and Claes Sandels. 60 pp. 1960. Stockholms Enskilda Bank Stockholm 16.

Dykan: Criminal Law, Vol. V, 1959. University of Tel–Aviv. School of Law and Economics.

CORRESPONDENCE

The Editor,
The Modern Law Review.

Sir,

May I suggest a way to avoid the unsatisfactory conclusions reached by Mr. M. P. Furmston in his discussion of the availability of exemption clauses to third parties (23 M.L.R. 373 at p. 385)?

Where a party to a contract is sued in tort for an act that is also a breach of contract, he can still set up the exemption clause. This, says Mr. Furmston, is *volenti*—operating by way of consent, not contract. Perhaps; but it looks more like a contractual surrender of the right—*volenti*, but in only one sense. You promise for consideration that some harm will not be actionable. It does not follow that everything that is called *volenti* will work in this way.

Where the defendant is a stranger to the contract he cannot expect the contractual sense of *volenti* (which is of course the more natural) to be applicable. All he can hope to show is that he has a defence in tort—that he has discharged his duty (*cf.* Street, *Torts*). Because the basis of such a defence is that plaintiff can look after himself—hence defendant's duty will in the circumstances be discharged—the presence and artificialities of contractual consent become irrelevant: to equate, as Mr. Furmston does, the contract with the consent that will be operative here is to be confused by the ambiguity of "consent."

This explains when the clause in *Olsen* v. *Corry* would avail against the infant plaintiff; and it would be paradoxical to give effect to the promise merely as such, where promise and consideration are ineffective. It is not simply, however, a matter of construction of the contract. The drunken driver cases should be booted back into contract or contributory negligence where they belong. In (ii) and (iii) the driver can never tell himself that he has discharged his duty to plaintiff.

Also *de lege ferenda* perhaps: but fewer hard cases than Mr. Furmston would allow.

D. J. Bentley.

Hertford College,
Oxford.

Sir,

Mr. Furmston's interesting article [1] contains a submission which is open to criticism. This submission is advanced in order to rebut Mr. Andrews' argument that section 56 of the Law of Property Act, 1925, does not enable a third party beneficiary of a simple contract to sue unless he provided consideration.[2]

[1] "Return to *Dunlop* v. *Selfridge*?" 23 M.L.R. 373.
[2] *Ibid.* at pp. 381–385.

"The mere fact that we treat him as a party to the contract will, of course, help him not at all. Party or not, he must as a promisee show that consideration has moved from him before he can succeed in his action, and in the majority of cases he will have given no consideration for the defendant's promise." [3]

According to Mr. Furmston, "Mr. Andrews' argument would fall to the ground if it could be shown that there was no difference in the case of a simple contract between the doctrine of privity and the rule that consideration must move from the promisee. If the two rules are really one, it would follow that a person could only be a party to a simple contract where he had given consideration, and accordingly, a statutory provision that a person is to be treated as a party must mean that he is to be treated as having given consideration. It is submitted that in fact the two rules are identical . . . ." [4]

Mr. Furmston's submission that the doctrine of privity and the rule that consideration must move from the promisee are identical involves (i) that a party to a contract is necessarily a party from whom consideration has moved; and (ii) that a party from whom consideration has moved is necessarily a party to a contract. This is precisely what Mr. Furmston seeks to demonstrate. He argues that (i) is true because "if C is not a party to the bargain he is not a party to the contract" [5]; and that (ii) is true because "consideration" must be a detriment suffered by the promisee which is causally connected with an offer addressed to him.[6]

No one is likely to quarrel with Mr. Furmston's postulate that "the doctrine of consideration . . . represents the acceptance by English law of a law of contract based on the bargained-for exchange," [7] but it does not follow from the correctness of this postulate that "contract" and "consideration" are in fact only used in the senses suggested by Mr. Furmston. He himself makes the point that historically the doctrine of privity was not part and parcel of the doctrine of consideration.[8] Moreover, he admits that "no doubt *obiter dicta* can be found which treat the principles as separate" [9] and that they were so treated by the Law Revision Committee.[10]

Of course, Mr. Furmston is entitled to argue that "contract" and "consideration" *ought* to be used only in the senses which he suggests, but in that case his submission should be that the two rules *ought* to be identical, which is a very different thing from contending that they are identical. On this point, however, Mr. Furmston seems to be curiously divided. On the one hand, he argues strenuously that the two rules are *identical*, and on the other hand he treats the doctrine of privity as if it were a Trojan horse which ought to be deported. He denounces the doctrine as "one of the more unfortunate legacies of comparative law. When English lawyers discovered that Continental systems of law which knew nothing of consideration nevertheless had the rule that a contract could only benefit and bind the parties, they assumed that this must be a fundamental characteristic of a contract and promptly transferred it to English law although the situation was already provided for." [11]

It is difficult to understand the nature of Mr. Furmston's complaint. If English lawyers had assumed *wrongly* that English law already possessed the doctrine of privity, then the importation of this doctrine could have been an "unfortunate legacy." But Mr. Furmston is at pains to emphasise that the

[3] 23 *Conveyancer* 179 at p. 192.
[4] 23 M.L.R. at pp. 382-383.
[5] *Ibid.* at p. 383.
[6] *Ibid.* at p. 384.
[7] *Ibid.* at p. 383, note 64.
[8] *Ibid.* at p. 378.
[9] *Ibid.* at p. 384.
[10] *Ibid.* at p. 383, note 62.
[11] *Ibid.* at p. 383.

assumption was correct. So what was the harm done? It is as if Ruritania complained that one of the more unfortunate legacies of comparative science was the importation of the principle of the steam engine on the ground that its own patriotic scientists had already discovered that principle.

Mr. Furmston's submission is not prompted merely by concern for the nicety of legal terminology. He has an axe to grind, namely, to rebut the argument indicated by Mr. Andrews. Unfortunately, his submission is irrelevant to this issue. Although Mr. Andrews uses the word "contract," section 56 of the Law of Property Act contains the word "agreement." [12] Hence, without going into the rightness or wrongness of Mr. Andrews' argument, Mr. Furmston's submission does not invalidate the point that all this section does is to treat a third party beneficiary as a party to the agreement, and that "party or not, he must as a promisee show that consideration has moved from him before he can succeed in his action. . . ." [13]

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[12] "A person may take an immediate or other interest in land or other property or the benefit of any condition, right of entry, covenant or *agreement* over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument."

[13] 23 *Conveyancer* at p. 192.